

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 31 May 2010

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v .THOMAS LUBANGA DYILO***

Public

Redacted Decision on Intermediaries

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Trial Chamber II

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, (“*Lubanga case*”) delivers the following Decision on Intermediaries:

I. Background and submissions

1. The role of the intermediaries used by the Office of the Prosecutor (“prosecution” or “OTP”) has increasingly become a focus of scrutiny since the commencement of the *Lubanga* trial, leading to the application by the defence for disclosure of their identities. The submissions of the parties have evolved with the evidence in the case, and in this Decision the Chamber addresses the up-to-date representations made on each side, rather than engaging in a wholesale analysis of their earlier submissions. Nonetheless, it has been necessary to explore the history to this issue in detail, setting out aspects of its evolution.

1. History

Overview of the intermediaries

2. The prosecution has used seven intermediaries, to contact approximately half of the witnesses it has called to give evidence against the accused in this trial (“incriminating evidence”), namely intermediary REDACTED DRC-OTP-WWWW-0031, REDACTED, intermediary DRC-OTP-WWWW-0081, REDACTED, intermediary DRC-OTP-WWWW-0143, REDACTED REDACTED, intermediary DRC-OTP-WWWW-0254, REDACTED, intermediary DRC-OTP-WWWW-0290, REDACTED, intermediary DRC-OTP-WWWW-0316, REDACTED, and intermediary DRC-OTP-WWWW-0321, REDACTED.¹ Of these the defence is aware of the identities and the roles of

¹ A comprehensive chart of individuals *de facto* carrying out intermediary functions, including prosecution staff, was provided by the prosecution in an email communication to the Legal Adviser to the Trial Division on 12 February 2010.

intermediary 316 (REDACTED) and intermediary 321 (REDACTED), in the circumstances set out below, and the defence is also aware of the identity of REDACTED intermediary 31 (REDACTED), REDACTED,² REDACTED.³

3. Overall, the Chamber has been informed that 23 individuals or organisations contacted or introduced potential incriminating witnesses or individuals whose evidence falls within Article 67(2) of the Rome Statute (“Statute”) or Rule 77 of the Rules of Procedure and Evidence (“Rules”). Of these intermediaries, 143 (REDACTED), 321 (REDACTED) and 316 (REDACTED) have been involved with the highest number of trial witnesses (REDACTED); REDACTED intermediary 31 (REDACTED), intermediaries 254 (REDACTED), 81 (REDACTED), 290 (REDACTED) and REDACTED. Most, although not all, of the intermediaries who contacted trial witnesses also contacted individuals whose evidence falls within Article 67(2) of the Statute or Rule 77 of the Rules (e.g. intermediary 143 (REDACTED) contacted REDACTED individuals and intermediary 316 (REDACTED) contacted REDACTED individuals in this latter category).⁴

4. One individual (DRC-OTP-WWWW-0178)⁵ who provided material under Rule 77 of the Rules was contacted by intermediaries 143 (REDACTED) and intermediary 316 (REDACTED). Prosecution witness 157 (REDACTED) had contact with two intermediaries (*viz.* REDACTED intermediary 31

² Transcript of hearing on 24 June 2009, ICC-01/04-T-198-CONF-ENG ET; Transcript of hearing on 25 June 2009, ICC-01/04-01/06-T-199-CONF-ENG ET; Transcript of hearing on 26 June 2009, ICC-01/04-01/06-T-200-CONF-ENG CT; Transcript of hearing on 30 June 2009, ICC-01/04-01/06-T-201-CONF-ENG CT; Transcript of hearing on 2 July 2009, ICC-01/04-01/06-T-202-CONF-ENG ET.

³ Transcript of hearing on 2 July 2009, ICC-01/04-01/06-T-202-CONF-ENG ET, page 80, lines 10 – 18; page 80, line 25 to page 82, line 2 and page 82, line 22 to page 84, line 4.

⁴ See footnote 1 and paragraph 32 of this Decision. Of the REDACTED individuals contacted by intermediary 316, REDACTED were later considered as “potential Court witnesses”, see Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1295-Conf-Exp; Annex 1 on Decision issuing a confidential and public redacted version of “Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters”, 8 May 2008, ICC-01/04-01/06-1311-Conf-Anx1; Preliminary and Final Decisions on the group of potential court witnesses, 25 June 2009, ICC-01/04-01/06-1986-Conf-Exp, confidential and public versions issued on 9 July 2009, ICC-01/04-01/06-2033.

⁵ This individual is also known as DRC-OTP-WWWW-0253.

(REDACTED) and intermediary 321 (REDACTED)).

5. Three intermediaries whose particular positions have been raised with the Chamber, as considered hereafter are:
 - i) Intermediary 123 (REDACTED), who is not listed on any of the charts provided by the prosecution on the position of intermediaries, contacted an unspecified number of witnesses who either provided exculpatory information (Article 67(2) of the Statute) or who were material to defence preparation (Rule 77 of the Rules) in the context of the *Katanga* case.⁶
 - ii) Intermediary 154 (REDACTED), contacted three witnesses who either provided exculpatory information (Article 67(2) of the Statute) or who were material to defence preparation (Rule 77 of the Rules).
 - iii) Intermediary 290 (REDACTED), who was involved in the initial contact with witness **DRC-OTP-WWWW-0016**, REDACTED (“prosecution witness 16 (REDACTED)”) (who testified before the Court between 9 and 12 June 2009).

The Chamber’s original position on disclosure

6. Following the referral of the case to Trial Chamber I on the confirmation of the charges, and during the ensuing pre-trial preparatory stage, the Chamber’s core approach was that disclosure of the identities of the intermediaries was unnecessary because this information was irrelevant to the issues in the case, as known at that stage. Whilst the Chamber underlined the presumption that evidence will be served in a non-redacted form, it recognised that if particular material requires protection (for instance, if people or organisations may be

⁶ Transcript of hearing on 14 October 2009, ICC-01/04-01/06-T-215-EXP-ENG ET, page 5, lines 6–10; page 6, lines 6 – 15.

placed at risk if their identities become known) and if the statement or document, in its redacted form, is sufficiently comprehensible for the purposes of dealing with trial issues, then the relevant identities may be disguised.⁷

The relevant chronology, focussing particularly on intermediaries 316 (REDACTED) and 321 (REDACTED)

7. Evidence demonstrating the potential for the use of intermediaries by the prosecution to be a live issue in the case emerged at an early stage. During the evidence of the prosecution's first witness on 28 January 2009, witness DRC-OTP-WWWW-0298, REDACTED ("prosecution witness 298 (REDACTED)"), initially testified that he and his friends were coming home from school when armed UPC soldiers took them to a military training camp.⁸ Thereafter, when giving evidence about the circumstances of this recruitment, the witness said that in light of the oath he had taken to tell the truth before the Court, the questioning was causing him problems.⁹ After the lunch break, the witness testified that what he had said that morning did not come from him but from someone else.¹⁰ When questioned about his earlier testimony – that he had been taken by UPC soldiers on his way home from school – he said that it was not true.¹¹ He said, "they taught me that over three and a half years. I don't like it. I would like to speak my mind as I swore before God and before everyone."¹² The witness stated that he had gone to an NGO that helped troubled children, and that he and his friends had been promised clothing and other things, and had been given their addresses and IDs.¹³ He was asked by the prosecution if he went to a training camp, and he replied, "I didn't go. They taught me those

⁷ See, for example, Decision on the application to disclose the identity of intermediary 143, 19 November 2009, ICC-01/04-01/06-2190-Conf-Exp, paragraphs 3, 4 and 7 – 9. Otherwise, a comprehensive sample of the Decisions dealing with the non-disclosure of the identities of intermediaries is set out in Annex A to this Decision.

⁸ Transcript of hearing on 28 January 2009, ICC-01/04-01/06-T-110-CONF-ENG CT, page 28, line 9 to page 29, line 5 and page 32, line 16 to page 33, line 25.

⁹ ICC-01/04-01/06-T-110-CONF-ENG CT, page 35, line 19 to page 36, line 14.

¹⁰ ICC-01/04-01/06-T-110-CONF-ENG CT, page 40, line 10.

¹¹ ICC-01/04-01/06-T-110-CONF-ENG CT, page 41, lines 17 – 22.

¹² ICC-01/04-01/06-T-110-CONF-ENG CT, page 40, lines 11 – 12.

¹³ ICC-01/04-01/06-T-110-CONF-ENG CT, page 40, lines 15 – 19.

things. They really deprived me. I couldn't follow my mind. I told myself I would do what I wanted, but in coming here I told myself that I would say what I know to be the truth."¹⁴

8. At this stage in his evidence, the prosecution requested a break,¹⁵ and when the Court resumed prosecution counsel sought time to investigate the security of, and protective measures for, this witness.¹⁶
9. When he recommenced his testimony two weeks later (10 February 2009), the witness said that he would tell the truth,¹⁷ and he testified extensively about the two occasions when he was abducted into the UPC army, and the time he spent in UPC training camps and on the battlefield. He indicated that he met intermediary 321 (REDACTED), REDACTED.¹⁸ He also mentioned that when he was in REDACTED, there were people who asked intermediary 321 (REDACTED) to look for him.¹⁹
10. In summary, therefore, the witness's final position was that his original account, including that given at the very outset of his testimony, was the truth and that he had not been persuaded to tell lies. Additionally, although he referred to intermediary 321 (REDACTED), he did not suggest that the latter had acted against the interests of justice.
11. Witness **DRC-OTP-WWWW-0299**, REDACTED ("prosecution witness 299 (REDACTED)"), gave evidence on 9 February 2009 that involved reference to

¹⁴ ICC-01/04-01/06-T-110-CONF-ENG CT, page 40, lines 20 – 24.

¹⁵ ICC-01/04-01/06-T-110-CONF-ENG CT, page 41, lines 6 – 12.

¹⁶ ICC-01/04-01/06-T-110-CONF-ENG CT, page 42, line 18 to page 43, line 22.

¹⁷ Transcript of hearing on 10 February 2009, ICC-01/04-01/06-T-123-CONF-ENG CT, page 4, line 1.

¹⁸ ICC-01/04-01/06-T-123-CONF-ENG CT, page 58, line 19 to page 59, line 15.

¹⁹ Transcript of hearing on 11 February 2009, ICC-01/04-01/06-T-124-CONF-ENG CT, page 34, lines 12 – 13.

intermediary 321 (REDACTED), but he did not voice any criticisms of him or suggest that other intermediaries had acted against the interests of justice.²⁰

12. On 23 February 2009, witness **DRC-OTP-WWWW-0213**, REDACTED (“prosecution witness 213 (REDACTED)”) was called, and he gave evidence about REDACTED.²¹ Significantly, the witness stated “REDACTED.”²²

13. On 27 February 2009, witness **DRC-OTP-WWWW-0008**, REDACTED, (“prosecution witness 08 (REDACTED)”). gave evidence that REDACTED intermediary 31 (REDACTED).²³ He did not voice any criticisms of him.²⁴

14. Witness **DRC-OTP-WWWW-0011**, REDACTED (“prosecution witness 11 (REDACTED)”), gave evidence on 4 March 2009, in which he mentioned REDACTED intermediary 31 (REDACTED), but he did not voice any criticisms of him or suggest that any other intermediaries had acted against the interests of justice.²⁵

15. On 5 March 2009, the Chamber addressed the issue of disclosure of intermediaries generally, and the position of intermediary 143 (REDACTED) in particular. This was during an *ex parte* status conference when the position of all those who had assisted child soldiers to fill out victims’ application forms or who generally effected introductions to the investigators from the OTP was addressed.²⁶ The prosecution, at the Chamber’s request,²⁷ produced a chart in which the witness numbers for each former child soldier were listed against

²⁰ Transcript of hearing on 9 February 2009, ICC-01/04-01/06-T-122-CONF-ENG CT, page 22, line 8 to page 23, line 3.

²¹ Transcript of hearing on 23 February 2009, ICC-01/04-01/06-T-133-CONF-ENG CT, page 48, line 9 to page 49, line 1.

²² ICC-01/04-01/06-T-133-CONF-ENG CT, page 49, lines 1 – 4.

²³ Transcript of hearing on 27 February 2009, ICC-01/04-01/06-T-138-CONF-ENG CT, page 10, lines 2 – 14.

²⁴ ICC-01/04-01/06-T-138-CONF-ENG CT, page 10, line 2 to page 14, line 14.

²⁵ Transcript of hearing on 4 March 2009, ICC-01/04-01/06-T-142-CONF-ENG CT, page 11, lines 5 – 23.

²⁶ Transcript of hearing on 5 March 2009, ICC-01/04-01/06-T-143-CONF-EXP-ENG CT, page 1, lines 13 – 24.

²⁷ ICC-01/04-01/06-T-143-CONF-EXP-ENG CT, page 8, line 4 to page 9, line 16.

those who assisted them, whilst maintaining their anonymity. The chart was provided to the defence.²⁸

16. The Chamber dealt with the twin issues then raised, as follows:

[...] the Defence explained that they wished to explore the possibility that certain people have participated in preparing false evidence for alleged former child soldiers, and in this case that [143] helped the witness to invent a false story or a false identity, or both. However, Maitre Mabilie indicated that currently she is not able to give the Court more details on this suggestion save that she supplied the Bench with part of the interview of Witness 11 on the 19th of January, 2008.²⁹

[...]

In all the circumstances, no evidential basis has been put before the court to support the suggestion or a line of questioning that [143] or others had set about securing false evidence from children which, self-evidently, could be Article 67(2) exculpatory material. On the material given to the Chamber during counsel's submissions, this remains an insufficiently founded allegation which the Defence has indicated it wishes to explore further having been given this person's identity. The Chamber has a clear duty to protect those at risk on account of the activities of the court (see Article 68(1)). And the Bench would need to be provided with a sustainable basis justifying this line of questioning before contemplating issuing an order that the Prosecution is to reveal the identity of someone who may be exposed to risk once their name is revealed. A desire to pursue a speculative line of questioning is insufficient. Instead, the Chamber needs to be shown that the questions have a proper foundation. Therefore, the rights of the accused are not infringed if disclosure is withheld of material that would put [143] at risk of harm if the information is sought solely for the purposes of developing a line of questions that are based on mere supposition. Given the risks to this individual, in our judgement this conclusion is proportionate and necessary.³⁰

17. Thereafter, on 20 March 2009 witness **DRC-OTP-WWWW-0294**, REDACTED ("prosecution witness 294 (REDACTED)"), gave evidence that he met intermediary 321 (REDACTED) during the demobilisation process when intermediary 321 (REDACTED) used to arrive with REDACTED.³¹ He said that intermediary 321 (REDACTED) worked with REDACTED intermediary 31 (REDACTED),³² and that intermediary 321 (REDACTED) helped him when

²⁸ ICC-01/04-01/06-2190-Conf-Exp, paragraph 8.

²⁹ Transcript of hearing on 13 March 2009, ICC-01/04-01/06-T-146-CONF-EXP-ENG ET, page 3, lines 11 – 18.

³⁰ ICC-01/04-01/06-T-146-CONF-EXP-ENG ET, page 6, line 19 to page 7, line 13.

³¹ Transcript of hearing on 20 March 2009, ICC-01/04-01/06-T-152-CONF-ENG CT, page 42, line 18 to page 43, line 6.

³² ICC-01/04-01/06-T-152-CONF-ENG CT, page 42, lines 22 – 25.

REDACTED intermediary 31 (REDACTED) left.³³ REDACTED intermediary 31 (REDACTED) told the witness that if he had a problem he could contact intermediary 321 (REDACTED).³⁴ From time to time the witness spent the night at the residence of intermediary 321 (REDACTED), and sometimes intermediary 321 (REDACTED) gave him money.³⁵

18. On 24 March 2009, witness **DRC-OTP-WWWW-0293**, REDACTED (“prosecution witness 293 (REDACTED)”), the mother of prosecution witness 294 (REDACTED) gave evidence that REDACTED.”³⁶

19. On 1 April 2009, the prosecution in an *ex parte* hearing accepted that references to the name “REDACTED”, intermediary 321 (REDACTED), should no longer be redacted from document REDACTED (which is a handwritten statement that is relevant to prosecution witness 298 (REDACTED)).³⁷

20. Witness **DRC-OTP-WWWW-0157**, REDACTED (“prosecution witness 157 (REDACTED)”), gave evidence on 9 June 2009, in which he stated that REDACTED.³⁸ He did not voice any criticisms of REDACTED intermediary 31 (REDACTED) or suggest that any of the intermediaries had acted against the interests of justice.³⁹

21. Witness **DRC-OTP-WWWW-0015**, REDACTED (“prosecution witness 15 (REDACTED)”),⁴⁰ commenced his evidence on 16 June 2009, when he made allegations against the intermediary 316 (REDACTED). He stated as follows:

³³ ICC-01/04-01/06-T-152-CONF-ENG CT, page 43, line 18.

³⁴ ICC-01/04-01/06-T-152-CONF-ENG CT, page 43, lines 21 – 23.

³⁵ ICC-01/04-01/06-T-152-CONF-ENG CT, page 43, line 18 to page 44, line 5.

³⁶ Transcript of hearing on 24 March 2009, ICC-01/04-01/06-T-153-CONF-ENG CT, page 53, line 13 to page 54, line 4.

³⁷ Transcript of hearing on 1 April 2009, ICC-01/04-01/06-T-161-CONF-EXP-ENG ET, page 12, lines 6 – 10.

³⁸ Transcript of hearing on 9 June 2009, ICC-01/04-01/06-T-188-CONF-ENG CT, page 72, line 17 to page 74, line 24.

³⁹ ICC-01/04-01/06-T-188-CONF-ENG CT, page 72, line 22 to page 77, line 10.

⁴⁰ Initially, this witness had stated to the prosecution that his name was REDACTED: DRC-OTP-0127-0074. This statements were entered into evidence with reference EVD-OTP-00319 on 17 March 2010; Transcript of

I'd like to say the following before I give my identity. I wanted to say the following. My coming here -- the purpose of this statement is to say everything that I lived through during that period. I came here to denounce certain things, certain irregularities, and also to denounce the crooks who tried to work against the OTP's investigation. They first tried to weaken the investigation carried out by the MONUC and now they're fighting against the OTP, and that is why I came here. When I arrived here, your Honours, I would like to ask that I be allowed to speak slowly and in detail to explain why I've come here and why I left where I came from.⁴¹

[...]

Well, before I give you my name I would like to ask you to allow me to denounce the situation that occurred. I wanted to say the following. I met the intermediary from the OTP, the investigator, and that man - I believe I can give his name - his name was REDACTED. I met him in REDACTED --⁴²

[...]

My name is REDACTED. This is contrary to the statement given to the OTP and that's why I wanted to make the statement and explain why I came here. That's why I met the OTP's intermediary who told me the following. He said, You have to change your name, you have to change your identity. Don't give the true story that took place; in other words, there was a story that they were telling to the witnesses. And I say that they're crooks. Why is it that I say that they're crooks and swindlers? Well, instead of letting me tell the true story of what took place and instead of letting me describe all of the events that I lived through, they are inventing statements in order to manipulate the investigation. They began doing that --⁴³

22. Shortly after these statements were made (at the beginning of the witness's testimony), his evidence was adjourned so that a fresh statement could be taken.⁴⁴ After the witness confirmed that his original statement was fundamentally inaccurate and he stated that "they're doing that to get rich",⁴⁵ the Presiding Judge observed:

Ms. Samson, in light of that intervention by the witness, namely, that the statement that has been provided to the Court is fundamentally inaccurate, we should not embark upon his evidence as some kind of voyage of discovery before this Court, finding out what it is now said the truth is. A further statement needs to be taken from this witness, setting out what he now says is the real position. And a decision can be taken at that stage as to whether or not he is to be called by the Prosecution, by

hearing on 17 March 2010, ICC-01-04/01-06-T-264-CONF-ENG ET, page 28, line 24 to page 29, line 14 and page 39, lines 19 – 22.

⁴¹ Transcript of hearing on 16 June 2009, ICC-01/04-01/06-T-192-CONF-ENG CT, page 4 line 19 to page 5, line 3.

⁴² ICC-01/04-01/06-T-192-CONF-ENG CT, page 5, lines 15 – 19.

⁴³ ICC-01/04-01/06-T-192-CONF-ENG CT, page 6, lines 7 – 18.

⁴⁴ ICC-01/04-01/06-T-192-CONF-ENG ET, page 7, lines 10 – 11.

⁴⁵ ICC-01/04-01/06-T-192-CONF-ENG CT, page 6, line 24 to page 7, line 4.

the Defence, or by the Court. But [...] if it is now said that his original statement is [...] not to be relied on, then the true position needs to be established before he gives evidence.⁴⁶

23. Given the evidence set out above, since 16 June 2009 the defence has been aware of the identity of intermediary 316 (REDACTED). On 23 June 2009, the Chamber ordered the re-disclosure of the statements or interview records relevant to him, with the redactions to his name lifted.⁴⁷ On 26 June 2009 the prosecution indicated that it would provide the defence with information concerning connections between intermediary 316 (REDACTED) and the trial witnesses by 29 June 2009.⁴⁸ The Chamber was informed on 29 June 2009 that intermediary 316 (REDACTED) introduced one trial witness, witness DRC-OTP-WWWW-0038, REDACTED (“prosecution witness 38 (REDACTED)”) to the prosecution and arranged his travel for his interview with the prosecution in March 2006.⁴⁹ As a result, prosecution witness 38 (REDACTED), who testified on 30 January and 3 February 2009, was re-interviewed by the prosecution in the presence of the defence on 17 and 18 September 2009.⁵⁰ The prosecution informed the Chamber on 10 July 2009 that intermediary 316 (REDACTED) had contacts with potential court witnesses 5 and 20.⁵¹ The transcript of the interview of intermediary 316 (REDACTED) was disclosed to the defence with interim redactions on 17 November 2009.⁵²

24. REDACTED.⁵³ REDACTED.⁵⁴ REDACTED.⁵⁵ REDACTED.⁵⁶ REDACTED⁵⁷
REDACTED,⁵⁸ REDACTED.⁵⁹

⁴⁶ ICC-01/04-01/06-T-192-CONF-ENG CT, page 7, lines 6 – 15.

⁴⁷ Transcript of hearing on 23 June 2009, ICC-01/04-01/06-T-196-CONF-ENG ET, page 70, line 19 to page 71, line 8.

⁴⁸ ICC-01/04-01/06-T-200-CONF-ENG ET, page 27, lines 12 – 20.

⁴⁹ Email communication from the prosecution to the Legal Adviser of the Trial Division on 29 June 2009.

⁵⁰ DRC-OTP-0215-0019.

⁵¹ Email communication from the prosecution to the Legal Adviser of the Trial Division on 10 July 2009; Preliminary and Final Decisions on the group of potential court witnesses, 25 June 2009, ICC-01/04-01/06-1986-Conf-Exp; Redacted version of “Preliminary and Final Decisions on the group of potential court witnesses”, 9 July 2009, ICC-01/04-01/06-2033-Conf-Anx1 and ICC-01/04-01/06-2033-Anx2.

⁵² Email communication from the prosecution to the Legal Adviser of the Trial Division on 15 February 2010. See also Decision on the communication of P-316’s statement, 17 December 2009, ICC-01/04-01/07-1728-Red.

⁵³ ICC-01/04-01/06-T-202-CONF-ENG ET, page 80, lines 10 – 18 and page 82, line 22 to page 83, line 8.

⁵⁴ ICC-01/04-01/06-T-202-CONF-ENG ET, page 80, lines 19 – 24.

25. When the defence case commenced on 27 January 2010 the situation evolved yet further. Maitre Mabilie opened the defence case on this issue as follows:

First of all, the Defence intend to prove to the Chamber that many of the Prosecution's witnesses came before the Court and testified knowing that they would be giving inaccurate information to the Court. The Defence also intend to show that some of this false testimony was fabricated with the assistance of intermediaries who collaborated with the Office of the Prosecutor. With leave, I will remind you that this trial began a year ago, and the statements made by the first witness were as follows: "The statements that I made before did not come of my own free will. They are statements from another person. I was taught these statements for three-and-a-half years. I don't like this. I would like to tell my version as I swore I would before everyone."

In response to the extremely specific question from the Presiding Judge, and I will remind you of this question, I quote, "This morning you told the Court that you had gone home after school and some soldiers from the UPC abducted you, you and your friends. This story that you have told us, is it [true] or false?" The witness answered, "It is false."

Even though this witness recanted, this initial statement by the first witness confirmed the investigations done by the Defence regarding the possibility that certain Prosecution witnesses had been manipulated so that they would give false testimony. And I would even go so far as to say that the hearings in which we heard from the Prosecution witnesses, and also thanks to the investigation done by the Defence, this assumption has been confirmed even more.

Today, the Defence intend to provide the Chamber with the results of our inquiries, in particular, we intend to demonstrate that all the individuals who were presented as child soldiers, as well as their parents in some cases, deliberately lied before this Court. The Defence intend to show that six of them were never child soldiers. The seventh lied about his age and the conditions in which he enrolled and the eighth never belonged to the UPC.

Furthermore, the Defence intends to show that the witnesses were encouraged to lie on a number of very specific points. In particular, their name, the names of their parents. The schools that they said that they had attended, and this was done so it would be more difficult to verify the information relating to them. They were encouraged to lie about their age and the fact that, allegedly, they belonged to an armed group so as to qualify for the charges against Mr Lubanga. The fact that their parents were dead, where in actual fact they apparently are still alive, the fact that they were subjected to cruel treatment, and that they were abducted, and this was done to make their accounts even more dramatic. They were also asked to claim that they could not read and that they did not remember specific details so as to make any possible verifications or comparisons extremely sensitive and extremely difficult to carry out. In our view, this situation is of the most grave concern.

⁵⁵ ICC-01/04-01/06-T-202-CONF-ENG ET, page 82, line 17 to page 84, line 4.

⁵⁶ ICC-01/04-01/06-T-202-CONF-ENG ET, page 80, line 25 to page 82, line 2.

⁵⁷ ICC-01/04-01/06-T-201-CONF-ENG CT, page 72, lines 11 – 13 and page 74, lines 9 – 12.

⁵⁸ ICC-01/04-01/06-T-201-CONF-ENG CT, page 73, lines 3 – 4 and page 74, lines 9 – 16.

⁵⁹ ICC-01/04-01/06-T-202-CONF-ENG ET, page 76, lines 14 – 22.

The Defence intend to begin its case by hearing from witnesses who will show that this false testimony was indeed fabricated. In particular, the Defence will call the parents and friends of these so-called child soldiers, representatives of various schools, as well as people who themselves took part at a particular point in this process of fabricating false testimony.

And for the Defence I would say that the demonstration of this fraudulent process of preparing false testimony affects not just the evidence relating to child soldiers, but also this demonstration will lead us to ask significant questions about the credibility of all the testimony that has been heard before this Court.⁶⁰

26. Witness **DRC-D01-WWWW-0003**, Joseph Maki Dhera (“defence witness 03 (Joseph Maki Dhera)”), commenced his evidence on 2 February 2010, which was largely focused on events concerning REDACTED, REDACTED.⁶¹ He was asked about intermediary 321 (REDACTED),⁶² whom he said he knew very well. Intermediary 321 (REDACTED) arrived in their area about 5 years before to recruit children.⁶³ He took children from the streets, saying that they were going to load sand into lorries.⁶⁴ The witness heard that intermediary 321 (REDACTED) had said that there was an NGO which was going to help the children who had dropped out of school; they were going to be given apprenticeships, taught trades or helped to attend school.⁶⁵ The organisation was REDACTED.⁶⁶

27. The witness went to REDACTED; this was organised by intermediary 321 (REDACTED). They first travelled to REDACTED with him, and then went on to REDACTED although they left intermediary 321 (REDACTED) behind.⁶⁷ REDACTED.⁶⁸ Intermediary 321 (REDACTED) had said to the witness that in REDACTED “you must ask the child to accept that he was a child

⁶⁰ Transcript of hearing on 27 January 2010, ICC-01/04-01/06-T-236-CONF-ENG ET, page 20, line 19 to page 22, line 18.

⁶¹ Transcript of hearing on 2 February 2010, ICC-01/04-01/06-T-239-CONF-ENG ET, page 12, line 15 to page 13, line 10.

⁶² ICC-01/04-01/06-T-239-CONF-ENG ET, page 16, lines 13 – 14.

⁶³ ICC-01/04-01/06-T-239-CONF-ENG ET, page 22, lines 24 – 25.

⁶⁴ ICC-01/04-01/06-T-239-CONF-ENG ET, page 23, lines 2 – 4.

⁶⁵ ICC-01/04-01/06-T-239-CONF-ENG ET, page 23, lines 9 – 15.

⁶⁶ ICC-01/04-01/06-T-239-CONF-ENG ET, page 24, line 4.

⁶⁷ ICC-01/04-01/06-T-239-CONF-ENG ET, page 24, line 19 to page 25, line 12.

⁶⁸ ICC-01/04-01/06-T-239-CONF-ENG ET, page 25, lines 24 – 25.

soldier, and you must say that the child's mother is deceased. With a view to getting money, you need to use all the means at your disposal."⁶⁹ The witness said that if intermediary 321 (REDACTED) had not told him what to say, he would not have gone to REDACTED.⁷⁰ Intermediary 321 (REDACTED) and another man provided the money for the trip.⁷¹ He said that he was given a false name – REDACTED – by officials of the ICC: the name was concocted by intermediary 321 (REDACTED); he said this "was a falsehood perpetrated by them".⁷² The name, REDACTED, is the name of REDACTED, but this name had been "reserved" for him (*viz.* the witness).⁷³ In addition to intermediary 321 (REDACTED), the witness said that REDACTED knew he was using this false name.⁷⁴

28. The witness said of intermediary 321 (REDACTED):

REDACTED did not have any secrets. When he arrived at the family, he explained to everyone. He talked about money. He told them that they would be given money. He said that the child had to claim to have served as a child soldier in order to get money. He went all over the town recruiting children, and he would tell you what you had to say. He told the children to claim that they had served as child soldiers, but I knew that the child had never been a child soldier.⁷⁵

29. In REDACTED he met and spoke with certain individuals: REDACTED. He mentioned REDACTED.⁷⁶ He said that many of those he spoke with knew he was lying: it was a plan that "we" had agreed on and "we" were told what to say. He said that REDACTED knew he was lying, because he heard the witness speaking to REDACTED.⁷⁷ The Chamber notes that the defence has indicated its interest in the testimony of prosecution witness REDACTED as being relevant

⁶⁹ ICC-01/04-01/06-T-239-CONF-ENG ET, page 31, lines 19 – 22.

⁷⁰ ICC-01/04-01/06-T-239-CONF-ENG ET, page 34, lines 2 – 4.

⁷¹ ICC-01/04-01/06-T-239-CONF-ENG ET, page 36, lines 12 – 14.

⁷² ICC-01/04-01/06-T-239-CONF-ENG ET, page 51, lines 18 – 23.

⁷³ ICC-01/04-01/06-T-239-CONF-ENG ET, page 52, lines 1 – 9.

⁷⁴ ICC-01/04-01/06-T-239-CONF-ENG ET, page 53, lines 14 – 20.

⁷⁵ ICC-01/04-01/06-T-239-CONF-ENG ET, page 34, lines 7 – 12.

⁷⁶ ICC-01/04-01/06-T-239-CONF-ENG ET, page 34, line 15 to page 35, line 17.

⁷⁷ ICC-01/04-01/06-T-239-CONF-ENG ET, page 36, line 19 to page 37, line 7.

to its theory that witnesses were induced to give false testimony by third parties.⁷⁸

30. The Chamber sent the following instruction to the prosecution by email on 3 February 2010:⁷⁹

Following the reference to an intermediary in court yesterday, the Chamber wishes to receive comprehensive information on all the intermediaries. To this end, a preliminary schedule was prepared. As you will see, the information needs to be completed. The prosecution is requested to complete it to include all relevant information, including on individuals who may not be referred to as intermediaries, but who have fulfilled this role by “facilitating” contact with (potential) witnesses (...), regardless of whether they were mentioned in court. If they were referred to in court or in disclosed documents, full references should be supplied.

31. The deadline was subsequently extended to 10 February 2010.⁸⁰ The prosecution provided two Excel tables setting out this information to the Chamber on 10 February 2010.⁸¹ Thereafter, the Chamber requested some amendments and additional information, and revised versions of the tables were provided to the Chamber by the prosecution on 12 February 2010.⁸²

32. The Chamber notes that there are some differences and discrepancies between the two tables provided by the prosecution on 12 February 2010 (one table follows the numerical order of witnesses and the other lists the witness contacted intermediary by intermediary). The latter table does not include all the information provided in the former. REDACTED⁸³ REDACTED.⁸⁴

⁷⁸ Requête de la Défense aux fins de comparution du Témoin DRC-OTP-WWWW-0297 en qualité de témoin de la Cour, ICC-01/04-01/06-2307-Conf, paragraphes 6 and 7.

⁷⁹ Email communication from a Legal Officer of the Trial Division to the prosecution on 3 February 2010.

⁸⁰ Email communication from a Legal Officer of the Trial Division to the prosecution on 8 February 2010.

⁸¹ Email communication from the prosecution to a Legal Officer of the Trial Division on 10 February 2010.

⁸² Email communication from the prosecution to a Legal Officer of the Trial Division on 12 February 2010.

⁸³ Victims and Witnesses Unit’s report on intermediary DRC-OTP-WWWW-0143, 6 May 2010, ICC-01/04-01/06-2422-Conf-Exp.

⁸⁴ Witness DRC-OTP-WWWW-0175 is listed in the 12 February 2010 chart as having been contacted by intermediary 316 and Witness DRC-OTP-WWWW-0177 is listed as having been contacted by intermediary REDACTED.

33. On 2 February 2010, the prosecution set out its position in an email to the Chamber as to whether the name of intermediary 321 (REDACTED) could be made public. The matter was put as follows:

REDACTED

REDACTED

REDACTED.⁸⁵

34. On 8 February 2010, the Chamber substantively addressed the necessity for a review of the prosecution's obligations vis-à-vis disclosure. The matter was expressed thus:

We are concerned as to the issue of disclosure in relation to intermediaries in the case, and we wish at the moment simply to put principally the Defence and the Prosecution on notice that we would like in the very near future to address the issue of whether there has been sufficient disclosure to the Defence, given the evidence that we have heard thus far as part of the Defence case.

The Defence should know that we have asked the Prosecution to provide us with up-to-date information as to the position as regards intermediaries and including the extent of disclosure thus far. Once we have received that information that I anticipate has been fairly labour-intensive in terms of its preparation, once we've received it, we will set a timetable for consideration of the issue.

Could you, please, on both sides, consider in principle what you now say is the position as regards the Prosecution's disclosure obligations given the way in which the case has been presented for the Defence and, most particularly, the evidence that's been called so far. We don't require submissions now, obviously, but later this week it is likely that we will ask for assistance orally on that issue.

It is likely that we will want to deal with this by way of submissions in Court rather than by filings so that the matter can be disposed of rapidly. So it's simply to put you all on notice that this is something that we are going to want to address later in the week.⁸⁶

35. The material witnesses called by the defence who mention intermediary 321 (REDACTED) were, first, defence witness 03 (Joseph Maki Dhera) (2 February 2010) (see his evidence summarised above), who was asked by intermediary 321 (REDACTED) to accompany REDACTED in order to meet with people

⁸⁵ Email communication from the prosecution to a Legal Officer of the Trial Division on 2 February 2010.

⁸⁶ Transcript of hearing on 8 February 2010, ICC-01/04-01/06-T-240-CONF-ENG-ET, page 2, lines 3 – 22.

from the ICC.⁸⁷ Intermediary 321 (REDACTED) told the witness that he must ask REDACTED to tell the investigators in REDACTED that he was a child soldier and that his mother was deceased.⁸⁸ The witness told prosecution investigators that REDACTED was his child and that REDACTED had been a child soldier, even though REDACTED was not his child and had never been a child soldier.⁸⁹ In exchange, intermediary 321 (REDACTED) promised the witness money and a house, and said that the ICC would be there to help him.⁹⁰ The witness said that he lied to the investigators because "I merely wanted to have some money."⁹¹

36. Second, witness **DRC-D01-WWWW-0004**, Claude Ndjango Nyeke (defence witness 04 (Claude Ndjango Nyeke)), stated in evidence commencing on 9 February 2010, that he met intermediary 321 REDACTED.⁹² Intermediary 321 (REDACTED) asked him how much money he was making from his REDACTED work and told him that if he agreed to say that he had been a child soldier, he could earn money and would be able to obtain training in any profession he chose.⁹³ Defence witness 04 (Claude Ndjango Nyeke) testified that intermediary 321 (REDACTED) told him and a number of other young people that they would be meeting with officials and that they must tell these officials that they were child soldiers and that Thomas Lubanga had forcibly enlisted them into the army.⁹⁴ Intermediary 321 (REDACTED) knew that none of these young people had been child soldiers, but he assigned some of them false names, told them to lie about their ages, and told them to talk to the officials about the battles in which they should claim to have fought.⁹⁵ The

⁸⁷ ICC-01/04-01/06-T-240-CONF-ENG ET, page 19, lines 1 - 5 and page 22, lines 19 - 21.

⁸⁸ ICC-01/04-01/06-T-239-CONF-ENG ET, page 31, lines 19 - 21.

⁸⁹ ICC-01/04-01/06-T-239-CONF-ENG ET, page 26, lines 8 - 13 and page 47, lines 19 - 23.

⁹⁰ ICC-01/04-01/06-T-240-CONF-ENG ET, page 22, lines 5 - 18 and page 25, lines 11 - 12.

⁹¹ ICC-01/04-01/06-T-239-CONF-ENG ET, page 32, lines 12 - 14.

⁹² Transcript of hearing on 9 February 2010, ICC-01/04-01/06-T-242-CONF-ENG ET, page 6, lines 3 - 6; Transcript of hearing on 11 February 2010, ICC-01/04-01/06-T-245-CONF-ENG ET, page 5, lines 12 - 17.

⁹³ ICC-01/04-01/06-T-245-CONF-ENG ET, page 11, line 25 to page 12, line 15; ICC-01/04-01/06-T-242-CONF-ENG ET, page 7, lines 2 - 4.

⁹⁴ ICC-01/04-01/06-T-242-CONF-ENG ET, page 7, lines 5 - 19.

⁹⁵ ICC-01/04-01/06-T-242-CONF-ENG ET, page 6, line 22 to page 7, line 1 and page 21, line 9 to page 22, line 8.

witness said that intermediary 321 (REDACTED) gave him a false name and that REDACTED obtained a student identity card in this false name; everything else on the card, including the witness's age and place of birth, was also false.⁹⁶

37. On 10 February 2010 the Chamber was informed that on 9 February 2010 the prosecution had disclosed to the defence an interview with intermediary 321 (REDACTED) of some 60 pages in length that had been conducted on 21 and 22 January 2010. It was summarised as reflecting questions which the OTP investigator asked intermediary 321 (REDACTED) about the REDACTED individuals he put in touch with the prosecution.⁹⁷ The Chamber indicated that what had once been unsubstantiated allegations about the behaviour of the intermediaries was now supported by evidence, although the judges had not formed any conclusions on that evidence.⁹⁸ In those changed circumstances, the judges sought assistance on various issues concerning the intermediaries. First, given that intermediary 321 (REDACTED) had been interviewed recently, was the prosecution contemplating interviewing all of those who had been involved with the alleged former child soldiers who had testified during the prosecution's evidence, and if so, the timing of the proposed interviews and the disclosure regime for the statements taken in consequence.⁹⁹ Second, the Chamber indicated that it required a "cast-iron guarantee" from the prosecution that the latter was wholly satisfied that in the new evidential circumstances, it had completely reviewed all of the materials relevant to the intermediaries, and that the prosecution's disclosure obligations had been discharged.¹⁰⁰ Third, whether the identity of the intermediaries should remain confidential in light of the recent allegations and the emerging defence case.¹⁰¹

⁹⁶ Transcript of hearing on 10 February 2010, ICC-01/04-01/06-T-243-CONF-ENG ET, page 14, lines 4 – 7; ICC-01/04-01/06-T-245-CONF-ENG ET, page 57, lines 21 – 22 and page 58, lines 8 – 18.

⁹⁷ ICC-01/04-01/06-T-243-CONF ET, page 1, line 13 to page 3, line 13.

⁹⁸ ICC-01/04-01/06-T-243-CONF ET, page 5, lines 3 – 13.

⁹⁹ ICC-01/04-01/06-T-243-CONF ET, page 5, line 17 to page 6, line 9.

¹⁰⁰ ICC-01/04-01/06-T-243-CONF ET, page 6, lines 10 – 18.

¹⁰¹ ICC-01/04-01/06-T-243-CONF ET, page 9, lines 9 – 19.

Fourth, whether the prosecution intended to call the intermediaries, and if so, when.¹⁰² The prosecution was given time to respond.

38. Turning to intermediary 316 (REDACTED), witness **DRC-D01-WWWW-0016**, REDACTED (“defence witness 16 (REDACTED)”), testified (commencing on 8 March 2010) that he had never been a child soldier but that he met extensively with intermediary 316 (REDACTED) in order to plan false statements concerning his own alleged enrolment by Thomas Lubanga in the UPC’s armed forces, as well as the enrolment of other children he knew.¹⁰³ These preparations included intermediary 316 (REDACTED) teaching the witness the names of certain army members.¹⁰⁴ The witness alleged that whilst he was being interviewed by OTP investigators in Kampala, intermediary 316 (REDACTED) was responsible for taking him to and from the interviews.¹⁰⁵ He and intermediary 316 (REDACTED) also stayed in the same hotel in Kampala, and every night after his interviews, intermediary 316 (REDACTED) told the witness what questions would be asked of him the next day and instructed him on how to answer.¹⁰⁶ In the mornings before the interviews, intermediary 316 (REDACTED) would refresh the witness’s memory concerning the lies he was to tell in that day’s interview.¹⁰⁷ When asked why he agreed to lie to investigators, the witness responded that intermediary 316 (REDACTED) gave him money.¹⁰⁸ The witness also testified that intermediary 316 (REDACTED) drafted a fake threatening letter, falsely signing it in Dieudonné Mbuna’s name, and told the witness to give the letter to an investigator so that ICC officials would help him to move out of REDACTED.¹⁰⁹

¹⁰² ICC-01/04-01/06-T-243-CONF ET, page 6, line 19 to page 8, line 3.

¹⁰³ Transcript of hearing on 8 March 2010, ICC-01/04-01/06-T-256-CONF-ENG ET, page 12, line 2 to page 14, line 17.

¹⁰⁴ ICC-01/04-01/06-T-256-CONF-ENG ET, page 15, line 22 to page 16, line 8.

¹⁰⁵ ICC-01/04-01/06-T-256-CONF-ENG ET, page 27, lines 17 – 20.

¹⁰⁶ Transcript of hearing on 10 March 2010, ICC-01/04-01/06-T-258-CONF-ENG CT, page 12, lines 7 – 13.

¹⁰⁷ ICC-01/04-01/06-T-256-CONF-ENG ET, page 28, lines 8 – 11.

¹⁰⁸ ICC-01/04-01/06-T-256-CONF-ENG ET, page 16, lines 9 – 16.

¹⁰⁹ Transcript of hearing on 9 March 2010, ICC-01/04-01/06-T-257-CONF-ENG ET, page 29, line 21 to page 32, line 13.

39. Prosecution witness 15 (REDACTED), was recalled on 18 March 2010. A further statement had been taken from him (in the presence of the defence) between 18 and 30 June 2009.¹¹⁰ He testified that intermediary 316 (REDACTED) instructed him to lie about his true identity and the identity of his family in order to make it very difficult for the Prosecutor to be able to conduct investigations into his origins and past.¹¹¹ He confirmed that his statement to the OTP investigators in 2005 contains some lies.¹¹² In the mornings before he met with the investigators, the witness would first meet with intermediary 316 (REDACTED), who told him everything that he was supposed to say; intermediary 316 (REDACTED) gave the witness the general idea and the witness was allowed to add a few details.¹¹³ REDACTED.¹¹⁴ The witness read a newspaper account, and he had to repeat the things that he had read in the newspaper to the investigator.¹¹⁵ The witness testified that during a meeting with OTP investigator REDACTED in a hotel room in Kampala in 2005, he was alone for a while on the balcony with intermediary 316 (REDACTED), who spoke to him in Lingala and told him that he should only talk to the investigator about the things that he had read beforehand in a document prepared by intermediary 316 (REDACTED).¹¹⁶ The witness testified that there were other intermediaries who were in touch with witnesses, and that these intermediaries knew each other and collaborated.¹¹⁷ REDACTED.¹¹⁸

The relevant chronology, focussing particularly on intermediaries 143 (REDACTED) and 290 (REDACTED)

¹¹⁰ ERN DRC-OTP-0213-0023 to 0048.

¹¹¹ Transcript of hearing on 18 March 2010, ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 22, lines 15 – 25.

¹¹² ICC-01/04-01/06-T-264-CONF-ENG ET, page 30, lines 7 – 9.

¹¹³ ICC-01/04-01/06-T-264-CONF-ENG ET, page 32, lines 14 – 18.

¹¹⁴ ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 9, lines 5 – 12.

¹¹⁵ ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 9, lines 12 – 14.

¹¹⁶ ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 4, line 9 to page 5, line 24.

¹¹⁷ ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 51, lines 23 – 25.

¹¹⁸ ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 36, lines 20 – 22.

40. On 18 November 2009, the Chamber issued its Decision on the application to disclose the identity of intermediary 143 (REDACTED),¹¹⁹ following the joint application from the defence teams in the Katanga and Ngudjolo trial before Trial Chamber II.¹²⁰ Having resolved the issue as regards the procedure to be followed under Regulation 42 of the Regulations of the Court, the Chamber addressed the position of intermediary 143 (REDACTED):

31. Turning to the facts of this application, it is submitted that 143 plays a very important role for the prosecution [...] and it may be difficult to find a replacement for this or future investigations. Additionally, the Chamber has been told that disclosing his identity will have very considerable consequences for him: REDACTED. For the purposes of the Lubanga trial it is not necessary to disclose his identity at present: no basis has been identified for concluding that his identity is relevant to any issue in the case, and, moreover, disclosure will prejudice the prosecution's further and ongoing investigations. It has been unnecessary in those circumstances for the Chamber to make a decision on the security risks to 143 if his identity is disclosed (see paragraph 12 above). Therefore, the Chamber does not propose to vary its original orders.

32. It is for Trial Chamber II to decide, *inter alia*, whether, within the context of the circumstances of the Katanga trial, it must order the prosecution to disclose his identity (given the use of the word "must" in Rule 81(2) of the Rules). If that is the result, Trial Chamber I will review its existing orders, as necessary. It is imperative that any relevant order by Trial Chamber II is brought immediately to the attention of Trial Chamber I by the prosecution, and vice-versa.¹²¹

41. However, given the history since 18 November 2009 set out above, on 15 March 2010 the Chamber indicated that the defence was entitled to know the names of certain intermediaries, and including that of intermediary 143 (REDACTED), although full reasons for this were to be provided in due course.¹²² The prosecution was requested to evaluate the protective measures for intermediary 143 (REDACTED), to liaise with the VWU and to inform the Chamber when the assessment will be ready.¹²³

¹¹⁹ ICC-01/04-01/06-2190-Conf-Exp.

¹²⁰ Requête de la Défense de Mathieu Ngudjolo aux fins d'obtenir la levée d'expurgation de l'identité de l'intermédiaire du Bureau du Procureur dans les éléments de preuve liés au témoin 267, 5 October 2009, ICC-01/04-01/06-2149; Defence Observations following the "Décision complémentaire sur la situation du témoin 267" (ICC-01/04-01/07-1483-Red2), 6 October 2009, ICC-01/04-01/06-2150.

¹²¹ ICC-01/04-01/06-2190-Conf-Exp, paragraphs 31 and 32.

¹²² Transcript of hearing on 15 March 2010, ICC-01/04-01/06-T-261-CONF-ENG ET, page 6, line 18 to page 7, line 8.

¹²³ ICC-01/04-01/06-T-261-CONF-ENG ET, page 34, line 16 to page 35, line 13.

42. The VWU provided its assessment informally to the Chamber on 4 May 2010 (it was filed thereafter, following the Chamber's email instruction, on 6 May 2010).¹²⁴ In essence the VWU has concluded that because intermediary 143 (REDACTED) provided substantial assistance to the prosecution in the process of obtaining witness statements – that have been reflected in evidence before Trial Chambers I and II – REDACTED. Wholly inappropriately, the VWU suggests that the “formal approval” of the Registrar will be sought before an order of the Trial Chamber in this context is implemented. The Chamber observes, first, any order for disclosure will be directed at the Prosecutor and not the VWU, and, second, the Registrar has no power to gainsay a judicial order. It is wrong, therefore, to suggest that implementation of the order of Trial Chamber I is dependent on the Registrar's approval, formal or otherwise. The Registrar is to be informed, but it is not for her to “approve” a judicial order.

43. It is necessary to set out certain relevant, albeit disparate, pieces of evidence relevant to intermediary 143 (REDACTED) together. Prosecution witness 07 (REDACTED)¹²⁵ and prosecution witness 08 (REDACTED)¹²⁶ were both called by the prosecution as former child soldiers in February and March 2009; their evidence contains discrepancies and is, at least to an extent, contradicted by REDACTED, witness DRC-D01-WWWW-0012, REDACTED (“defence witness 12 (REDACTED)” who testified in February 2010. REDACTED.¹²⁷ REDACTED,¹²⁸ REDACTED.¹²⁹ The defence has indicated that in re-interviews

¹²⁴ Email communication from the Victims and Witnesses Unit to the Legal Adviser of the Trial Division on 4 May 2010; Victims and Witnesses Unit's report on intermediary DRC-OTP-WWWW-0143, 6 May 2010, ICC-01/04-01/06-2422-Conf-Exp.

¹²⁵ Transcript of hearing on 13 March 2009, ICC-01/04-01/06-T-148-CONF-ENG CT; Transcript of hearing on 17 March 2009, ICC-01/04-01/06-T-149-CONF-ENG-ET; Transcript of hearing on 18 March 2009, ICC-01/04-01/06-T-150-ENG-WT.

¹²⁶ Transcript of hearing on 25 February 2009, ICC-01/04-01/06-T-135-CONF-ENG ET; Transcript of hearing on 26 February 2009, ICC-01/04-01/06-T-137-CONF-ENG ET; Transcript of hearing on 27 February 2009, ICC-01/04-01/06-T-138-CONF-ENG ET.

¹²⁷ ICC-01/04-01/06-T-248-CONF-ENG ET, page 41, lines 4 – 16.

¹²⁸ Transcript of hearing on 17 February 2010, ICC-01/04-01/06-T-248-CONF-ENG ET, page 39, lines 7 – 16.

¹²⁹ Transcript of hearing on 13 March 2009, ICC-01/04-01/06-T-148-CONF-ENG-ET, page 59, lines 20 – 23.

conducted by the prosecution in January 2010, further discrepancies came to light – for instance, REDACTED.¹³⁰

44. Witness DRC-OTP-WWWW-0010, REDACTED (“prosecution witness 10 (REDACTED)”) was also called by the prosecution as an alleged former child soldier.¹³¹ Critically, she maintains that she was recruited as a soldier for the first time when REDACTED,¹³² whereas witness DRC-D01-WWWW-0005, REDACTED, (“defence witness 05 (REDACTED)”) and witness DRC-D01-WWWW-0006, REDACTED (“defence witness 06 (REDACTED)”) REDACTED.¹³³ This is directly relevant to the charges against the accused of conscripting, enlisting and using child soldiers because there may be a difference between someone who is forcibly abducted by UPC soldiers having never served as a soldier previously, on the one hand, and someone who enlists voluntarily following earlier military service, on the other. The defence relies on further discrepancies, and notes that prosecution witness 10 (REDACTED) provided information to the prosecution in re-interviews conducted after the conclusion of her testimony that contradicts parts of her testimony before the Court.¹³⁴

45. Prosecution witness 213 (REDACTED) gave evidence, having been called by the prosecution, that he was enlisted by the UPC en route home from school (REDACTED).¹³⁵ He said he was enlisted in the UPC on three separate occasions.¹³⁶ Defence witness DRC-D01-WWWW-0002 (REDACTED) (“defence

¹³⁰ Requête de la Défense aux fins de Dépôt de documents, 5 May 2010, ICC-01/04-01/06-2417-Conf, paragraphs 9 and 10, with references to transcripts and statements.

¹³¹ Transcript of hearing on 5 March 2009, ICC-01/04-01/06-T-144-CONF-ENG ET; Transcript of hearing on 6 March 2009, ICC-01/04-01/06-T-145-CONF-ENG ET.

¹³² ICC-01/04-01/06-T-144-CONF-ENG ET, page 18, lines 6 – 21 ; ICC-01/04-01/06-T-145-ENG WT, page 52, lines 15 – 25.

¹³³ Transcript of hearing on 15 March 2010, ICC-01/04-01/06-T-261-CONF-ENG-ET, page 17, lines 16 – 24; ICC-01/04-01/06-T-254-Red-ENG-WT, page 52, line 21 to page 53, line 1 and page 62, line 19 to page 63, line 1.

¹³⁴ ICC-01/04-01/06-2417-Conf, paragraphs 14 and 15, with references to transcripts and statements.

¹³⁵ Transcript of hearing on 23 February 2009, ICC-01/04-01/06-T-132-CONF-ENG CT, page 6, line 24 to page 7, line 7 and page 9, line 20 to page 10, line 15.

¹³⁶ Transcript of hearing on 20 February 2009, ICC-01/04-01/06-T-132-CONF-ENG CT, page 9, lines 18-19.

witness 02 (REDACTED)”), who maintained he was REDACTED,¹³⁷ testified that REDACTED did not leave home during the entire period between 1995 and 2003.¹³⁸ Defence witness 02 (REDACTED) set out that in 2007, REDACTED.¹³⁹ REDACTED,¹⁴⁰ REDACTED.¹⁴¹

46. REDACTED.¹⁴² REDACTED.

47. Prosecution witness 11 (REDACTED) referred in evidence to REDACTED intermediary 31 (REDACTED),¹⁴³ although he did not make any adverse suggestions about him; REDACTED.¹⁴⁴ As with some of the other witnesses mentioned above, the defence submitted that information provided by prosecution witnesses 07 (REDACTED), 08 (REDACTED) and 10 (REDACTED) during re-interviews conducted by the prosecution after completion of their testimony contradicts their testimony before the Court, for example in relation to prosecution witness 11 (REDACTED)’s school history, the places where he lived and the relatives with whom he lived..¹⁴⁵

48. The consequence of this evidence relating to intermediary 143 (REDACTED) is discussed later in this Decision.

49. Intermediary 290 (REDACTED), as set out above, has been included in the schedule of intermediaries, or others, who have had contact with relevant individuals (as provided to the Chamber by the prosecution on 12 February

¹³⁷ Transcript of hearing on 27 January 2010, ICC-01/04-01/06-T-236-CONF-ENG ET, page 28, lines 15 – 23.

¹³⁸ ICC-01/04-01/06-T-236-CONF-ENG ET, page 31, line 16 to page 32, line 1 and page 34, lines 20 – 23.

¹³⁹ ICC-01/04-01/06-T-236-ENG WT, page 36, line 12 to page 40, line 17.

¹⁴⁰ Transcript of hearing on 28 January 2010, ICC-01/04-01/06-T-237-CONF-ENG CT, page 28, lines 17 – 19.

¹⁴¹ ICC-01/04-01/06-T-237-CONF-ENG CT, page 40, line 10 to page 41, line 9.

¹⁴² Transcript of hearing on 24 June 2009, ICC-01/04-01/06-T-198-Red-ENG WT; Transcript of hearing on 25 June 2009 ICC-01/04-01/06-T-199-CONF-ENG CT; Transcript of hearing on 26 June 2009, ICC-01/04-01/06-T-200-CONF-ENG CT; Transcript of hearing on 30 June 2009, ICC-01/04-01/06-T-201-Red-ENG WT; Transcript of hearing on 2 July 2009, ICC-01/04-01/06-T-202-ENG WT.

¹⁴³ Transcript of hearing on 4 March 2009, ICC-01/04-01/06-T-142-CONF-ENG CT, page 11, lines 5 – 23.

¹⁴⁴ ICC-01/04-01/06-T-142-CONF-ENG-ET, page 12, line 1 to page 16, line 1.

¹⁴⁵ ICC-01/04-01/06-2417-Conf, paragraphs 16-18, with references to transcripts and statements.

2010). He was involved in the initial contact with prosecution witness 16 (REDACTED), who testified before the Court between 9 and 12 June 2009.¹⁴⁶

50. Intermediary 290 (REDACTED) is a REDACTED former prosecution witness.¹⁴⁷ The Prosecutor withdrew his name from its list of trial witnesses on 13 February 2008.¹⁴⁸ As his evidence included potentially exculpatory material, and his identity could not be disclosed to the defence, the prosecution identified alternative evidence and disclosed a summary of the potentially exculpatory or Rule 77 material.¹⁴⁹ The Chamber subsequently included intermediary 290 (REDACTED) in the group of “potential court witnesses” analysed in the “Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters”, issued on 24 April 2008.¹⁵⁰ REDACTED.¹⁵¹ In its “Preliminary and Final Decisions on the group of potential court witnesses”,¹⁵² the Chamber summarised the status of the witness as follows:

60. [...] following a varied history, this witness currently will cooperate with the Court, but only if his or her anonymity is preserved vis-à-vis the defence and the public. Most importantly, he or she provides information to the effect that children under the age of 15 years may have been trained in the UPC/FPLC in order to protect their families and their territory (potentially raising issues of self-defence or necessity). The prosecution’s submission is that the evidence of the witness in this regard is speculative, and is of low value as exonerating information.

¹⁴⁶ Transcript of hearing on 9 June 2009, ICC-01/04-01/06-T-188-CONF-ENG CT, page 84, line 16 onwards; Transcript of hearing on 10 June 2009, ICC-01/04-01/06-T-189-CONF-ENG CT; Transcript of hearing on 11 June 2009, ICC-01/04-01/06-T-190-CONF-ENG CT; Transcript of hearing on 12 June 2009, ICC-01/04-01/06-T-191-CONF-ENG CT.

¹⁴⁷ Preliminary and Final Decisions on the group of potential court witnesses, 25 June 2009, ICC-01/04-01/06-1986-Conf-Exp, paragraph 48, confidential and public versions issued on 9 July 2009, ICC-01/04-01/06-2033.

¹⁴⁸ Transcript of hearing on 13 February 2008, ICC-01/04-01/06-T-76-CONF-EXP-ENG-ET, page 8, line 24 to page 9, line 3.

¹⁴⁹ Prosecution’s Submission of Information on Certain Individuals pursuant to the ex parte Order of the Trial Chamber of 13 February 2008, 22 February 2008, ICC-01/04-01/06-1187-Conf-Exp and ICC-01/04-01/06-1187-Conf-Exp-Anx.

¹⁵⁰ Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1295-Conf-Exp; Annex 1 on Decision issuing a confidential and public redacted version of “Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters”, 8 May 2008, ICC-01/04-01/06-1311-Conf-Anx 1.

¹⁵¹ ICC-01/04-01/06-1295-Conf-Exp, paragraphs 100 – 102.

¹⁵² Preliminary and Final Decisions on the group of potential court witnesses, 25 June 2009, ICC-01/04-01/06-1986-Conf-Exp, confidential and public versions issued on 9 July 2009, ICC-01/04-01/06-2033.

61. Individuals cannot be compelled to cooperate with the Court, and the identity and the testimony of this witness will only have evidential value of significance if he or she agrees to give evidence under oath, having lifted anonymity as regards the defence, so that the testimony can be realistically investigated by questioning. If the witness is to remain anonymous because of well-founded security concerns, the redacted materials (which exclude identifying details) already served on the defence constitute the extent of the disclosure that is achievable.

62. The Chamber has carefully borne in mind its duty to protect witnesses who testify before the Court and to ensure that the rights of the accused are not prejudiced and that the proceedings are fair. In light of the specific security concerns of witness 0290, and unwillingness to provide his or her identity to the defence, and the unavailability of any protective measures that will effectively reduce the risks, the preliminary view of the Chamber is that the identity of this individual should not be disclosed to the defence. In the view of the Chamber, the main issue arising out of the evidence of this witness which is of potential assistance to the defence (*viz.* information that children under the age of 15 years may have been trained in the UPC/FPLC in order to protect their families and their territory) has been covered in significant detail in other material already disclosed to the defence. Notwithstanding the conclusion in paragraph 61 above, the Chamber will consider calling the witness if in due course it considers this step is necessary, pursuant to Article 64(6)(b) of the Statute, once the issues in the case have emerged.

63. If the parties or the participants have any observations on this preliminary proposal, they are to file written submissions within two weeks of the notification of the redacted version of this Decision. The Chamber will hold a status conference (if necessary) shortly thereafter. The precise manner and timing of any testimony from this witness will only be addressed if the issue becomes relevant.¹⁵³

51. REDACTED.¹⁵⁴ As a result his identity, thus far, has not been disclosed to the defence.

52. Prosecution witness 16 (REDACTED) did not refer to intermediary 290 (REDACTED) as an intermediary during his evidence.¹⁵⁵

53. The consequence of this evidence relating to intermediary 290 (REDACTED) is discussed later in this Decision.

¹⁵³ ICC-01/04-01/06-1986-Conf-Exp, paragraphs 60 –63.

¹⁵⁴ Annex 6 of Rapport du Greffe sur l'évaluation des mesures de protection nécessaires pour les témoins désignés dans la Décision du 24 avril 2008, 6 March 2009, ICC-01/04-01/06-1766-Conf-Exp.

¹⁵⁵ ICC-01/04-01/06-T-188-CONF-ENG CT, page 84, line 16 onwards; ICC-01/04-01/06-T-189-CONF-ENG CT; ICC-01/04-01/06-T-190-CONF-ENG CT; ICC-01/04-01/06-T-191-CONF-ENG CT.

54. The defence has informed the Chamber that it will file its application on abuse of process in the near future, either after the testimony of prosecution witness 297 (REDACTED) and D01-0029 or after the testimony of the intermediaries or the prosecution's investigator (if ordered by the Chamber).¹⁵⁶

2. The Submissions

55. The main submissions are:

- a) The Prosecution's Submissions in Response to the Trial Chamber's Oral Request of 10 February 2010.¹⁵⁷
- b) The defence response of 2 March 2010.¹⁵⁸
- c) The Prosecution Proposed Procedure for Dealing with Intermediaries'.¹⁵⁹
- d) Additional defence submissions of 19 March 2010.¹⁶⁰
- e) The defence response to the procedure proposed by the prosecution.¹⁶¹
- f) The response of the legal representatives to the additional observations of the defence.¹⁶²
- g) The Prosecution's Submission and Further Submissions of New Information on Threats against Intermediaries.¹⁶³

¹⁵⁶ Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Chamber on 5 May 2010.

¹⁵⁷ Prosecution's Submissions in Response to Trial Chamber's Oral Request of 10 February 2010, 22 February 2010 (notified 23 February 2010, ICC-01/04-01/06-2310-Conf. A corrigendum was filed on the same day (ICC-01/04-01/06-2310-Conf-Corr) and a redacted version was filed on 25 February 2010 (ICC-01/04-01/06-2310-Red).

¹⁵⁸ Réponse de la Défense à la « *Prosecution's Submissions in Response to Trial Chamber's Oral Request of 10 February 2010* » relative à la divulgation de l'identité des intermédiaires du Bureau du Procureur, déposée le 23 février 2010, 2 March 2010, ICC-01/04-01/06-2315-Conf. A public redacted version was filed on 23 March 2010 (ICC-01/04-01/06-2315-Red).

¹⁵⁹ Prosecution Proposed Procedure for Dealing with Intermediaries, 19 March 2010, ICC-01/04-01/06-2362.

¹⁶⁰ Observations additionnelles de la Défense relatives aux intermédiaires, 19 March 2010, ICC-01/04-01/06-2364-Conf.

¹⁶¹ Réponse de la Défense à la "Prosecution's Proposed Procedure for dealing with intermediaries", déposée le 19 mars 2010, 24 March 2010, ICC-01/04-01/06-2375.

¹⁶² Réponse aux observations additionnelles de la Défense relatives aux intermédiaires, 16 April 2010, ICC-01/04-01/06-2394-Conf.

¹⁶³ Prosecution's Submission of New Information on Threats against Intermediaries, 26 April 2010, ICC-01/04-01/06-2397-Conf-Exp; Prosecution's Further Submissions of New Information on Threats against Intermediaries, 6 May 2010, ICC-01/04-01/06-2423-Conf-Exp.

56. In addition, the defence for Germain Katanga, joined by the defence for Mathieu Ngudjolo, *inter alia* requested the disclosure of the non-redacted transcripts of evidence about prosecution intermediaries in the *Lubanga* case, in particular in relation to intermediary 316 (REDACTED), and generally “referring to allegations relating to the corruption/manipulation of Prosecution witnesses by Prosecution intermediaries”.¹⁶⁴ Final consideration of these applications is pending.¹⁶⁵

The prosecution's submissions

57. In its submissions on 25 February 2010, the prosecution suggested that there is a “substantial reason” to bar the defence from challenging the credibility of certain prosecution witnesses at this stage in the trial, on the basis that they came before the Court and testified knowing that they would be giving inaccurate information to the Court and that their false testimony had been fabricated with the assistance of intermediaries who collaborated with the prosecution, because that “argument was raised for the first time on 27 January 2010” and this suggestion was not put to the witnesses “because the Defence deliberately chose not to present its case at the appropriate time”.¹⁶⁶ The prosecution indicated that it intended to file an application “soon” to prohibit the defence from leading evidence on “critical and material issues” that have not been put to witnesses during cross-examination or communicated to the prosecution in advance of the defence case.¹⁶⁷

¹⁶⁴ URGENT Defence Request for the disclosure of Lubanga transcripts, 18 March 2010, ICC-01/04-01/06-2361-Conf-Exp, paragraph 9(a)(iii); Adjunction de la Défense de Mathieu Ngudjolo à la Requête ICC-01/04-01/06-2361-Conf-Exp introduite par l'Equipe de Défense de Germain Katanga le 19 mars 2010, 29 March 2010, ICC-01/04-01/06-2381-Conf-Exp; see also URGENT Defence Request for the disclosure of Lubanga transcripts and of the identity of Prosecution Intermediaries, 11 March 2010, ICC-01/04-01/07-1960-Conf-Exp-Corr, notified to Trial Chamber I; Prosecution's Response to “URGENT Defence Request for the disclosure of Lubanga transcripts” [ICC-01/04-01/06-2361-Conf-Exp], 25 March 2010, ICC-01/04-01/06-2377-Conf-Exp; Réponse des représentants légaux de victimes du groupe VO2 à la demande de communication de transcriptions d'audiences du procès Lubanga à la Défense de M. Germain Katanga, 29 March 2010, ICC-01/04-01/06-2382-Conf-Exp.

¹⁶⁵ The Chamber issued an interim order on 1 April 2010, email communication from the Legal Adviser to the Trial Division to the parties in the *Lubanga* and *Katanga and Ngudjolo* cases on 1 April 2010.

¹⁶⁶ ICC-01/04-01/06-2310-Conf-Corr, page 3.

¹⁶⁷ ICC-01/04-01/06-2310-Conf-Corr, pages 3 – 4.

58. The prosecution put their central submissions in this filing thus:

On those points, the Prosecution first reminds the Chamber that the environment in which intermediaries operate is dangerous and risk of harm is high both to them and to witnesses who may have interacted with them. In the Prosecution's submission it would be a dereliction of its duty of care towards its intermediaries and the witnesses with whom they deal if their identities were to be disclosed to the Defence, not least because there are no allegations against them. Beyond the obligation to protect these intermediaries and witnesses, it is essential to the success of the ICC that intermediaries not be revealed unless there is the most pressing reason. The Prosecutor's mandate to investigate and prosecute the world's most serious offences cannot succeed without the use of trusted and reliable intermediaries; any action by the Court that chills the ability of the Prosecution to protect their identities and securities will chill the Prosecution's ability to obtain assistance by other intermediaries in future cases.

Given the information provided thus far, the Prosecution will consider the possibility of calling Intermediary W-321, but does not currently intend to call any other intermediary as a witness. Nor is there any reason, on the existing information, to conduct substantive reinterviews of them and submit those statements to the defence. This view, of course, may change once the specific allegations against them are disclosed. But, having had less than one month's notice of the defence case, and with inadequate information as to its factual basis, the Prosecution has not made any significant change to its strategy as regards the issue of intermediaries.¹⁶⁸

59. The prosecution reminded the Chamber that it had disclosed the identities of two intermediaries.¹⁶⁹ The prosecution suggested that it did not intend to investigate, through interviews or re-interviews, the intermediaries it has used, or to call them as witnesses, because the evidence did not justify either course.¹⁷⁰ The prosecution argued that given the issue relates to alleged abuse of process, the focus should not be whether intermediaries approached some children and proposed that they lie, but whether this was known, or should have been known, within the OTP.¹⁷¹

60. The prosecution stressed the importance of the role played by intermediaries,¹⁷² and their central role in the effective work of the court.¹⁷³ It

¹⁶⁸ ICC-01/04-01/06-2310-Conf-Corr, pages 4 – 5.

¹⁶⁹ ICC-01/04-01/06-2310-Conf-Corr, paragraph 10.

¹⁷⁰ ICC-01/04-01/06-2310-Conf-Corr, paragraph 10.

¹⁷¹ ICC-01/04-01/06-2310-Conf-Corr, paragraph 11.

¹⁷² ICC-01/04-01/06-2310-Conf-Corr, paragraph 12.

¹⁷³ ICC-01/04-01/06-2310-Conf-Corr, paragraphs 13 and 14.

suggested that it has made “considerable effort” in order to “identify and evaluate” the reliability, knowledge and integrity of intermediaries, and their ability to perform their role discreetly in order to protect themselves, the witnesses and the investigation generally.¹⁷⁴ The prosecution relies on other individuals who perform a similar task on an *ad hoc* basis who are not referred to as intermediaries although they undertake particular roles with witnesses.¹⁷⁵

61. It is indicated that intermediaries assist in later stages of cases, for instance in assisting the OTP to investigate allegations made by the defence and other aspects of the accused’s case, and they help other organs of the court, such as the Office of Public Counsel for Victims (“OPCV”).¹⁷⁶
62. As to the individual intermediaries, it is suggested that “[m]any of the intermediaries used by the OTP in this case REDACTED. Many intermediaries REDACTED. Living where they live, REDACTED, they are at real, documented risk on account of the activities they undertake for the OTP and for other organs of the Court”.¹⁷⁷
63. An argument against disclosure based on a suggested analogous protection that is provided to informants who assist national courts was developed.¹⁷⁸ Additionally if the identity of an informant has been inadvertently revealed, the prosecution thereafter has disclosed his identity in other relevant documents.¹⁷⁹
64. It is argued that it is only when allegations of impropriety in relation to a particular intermediary’s role are advanced that “the balance [should] shift

¹⁷⁴ ICC-01/04-01/06-2310-Conf-Corr, paragraph 15.

¹⁷⁵ ICC-01/04-01/06-2310-Conf-Corr, paragraph 16.

¹⁷⁶ ICC-01/04-01/06-2310-Conf-Corr, paragraph 17.

¹⁷⁷ ICC-01/04-01/06-2310-Conf-Corr, paragraph 18.

¹⁷⁸ ICC-01/04-01/06-2310-Conf-Corr, paragraph 21.

¹⁷⁹ ICC-01/04-01/06-2310-Conf-Corr, paragraph 22.

from protection of witnesses, the intermediary [...] and prejudice to ongoing investigations and towards disclosure.”¹⁸⁰

65. An important element of the prosecution’s submissions is set out as follows:

“[t]he evidence presented by the Defence provides no basis to impugn the integrity of intermediaries on a wholesale basis. Rather, at this stage the Court is faced with specific allegations raised in relation to two individuals. As a result, the Prosecution does not intend to conduct interviews of intermediaries where there are no live issues in relation to their integrity or their work. The prosecution does not consider that the mere fact that someone is an intermediary, or that a witness has been put in contact with the Prosecution by a third-individual, in the absence of any allegations against the conduct of that person, could form the basis for the disclosure of their identity. If the disclosure of the identity of all intermediaries becomes the standard, it will seriously impair the Prosecution’s ability to recruit and use intermediaries as a practice, and will prejudice its ability to investigate these cases.”¹⁸¹

66. If the identities of intermediaries are disclosed to the defence, the prosecution nonetheless resists any wider disclosure to the public because, first, on account of the significant risks to the intermediaries this would entail; second, witnesses with whom the intermediaries have associated would also potentially be at risk; third, their usefulness as intermediaries would be compromised; and, fourth, their “professional credibility” would be undermined on the basis of unsubstantiated allegations.¹⁸²

67. The prosecution argues that it has complied with its disclosure obligations, in that when issues have arisen during the defence case, it has reviewed the material in its possession, and, for example, this review has led it to disclose the interviews conducted with intermediaries 316 (REDACTED) and 321 (REDACTED).¹⁸³

The defence response

¹⁸⁰ ICC-01/04-01/06-2310-Conf-Corr, paragraph 22.

¹⁸¹ ICC-01/04-01/06-2310-Conf-Corr, paragraph 23.

¹⁸² ICC-01/04-01/06-2310-Conf-Corr, paragraphs 24 – 28.

¹⁸³ ICC-01/04-01/06-2310-Conf-Corr, paragraph 29.

68. The defence replied in the Defence response to the 'Prosecution's submissions in response to Trial Chamber's oral request of 10 February 2010' (as regards the disclosure of the intermediaries' identities) on 2 March 2010.¹⁸⁴

69. It is argued that the principle that the defence should be provided access to the intermediaries' identities is not in doubt, as has been reflected in the following quotation from a Decision of Trial Chamber II:¹⁸⁵

[t]he Chamber recognised that the Defence has a general interest in knowing the names of the Prosecution's intermediaries and that it would seem to be a matter of fairness that the Defence be informed of the identity of the intermediaries of the Office of the Prosecutor, given that the latter already knows the identity of the resource persons of the Defence. The Chamber further recognised that the fact that P-143 acted as an intermediary for a large number of Prosecution witnesses increases the interest of the Defence in knowing which witnesses P-143 has been in contact with.¹⁸⁶

70. It is argued that this principle can only be avoided in exceptional situations, if the facts justify that course – an approach which, it is averred, does not apply in the present situation.¹⁸⁷

71. The defence suggests that the obligation imposed on the prosecution to disclose information on intermediaries is supported by Article 69(3) of the Statute: "The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth."¹⁸⁸

72. The defence contests the suggestion that it has breached its disclosure obligations.¹⁸⁹ Equally, the accused suggests that the prosecution has incorrectly argued that the defence has stated that it does not intend to present a positive case; instead, the defence merely indicated at the outset of the trial that at that

¹⁸⁴ ICC-01/04-01/06-2315-Conf.

¹⁸⁵ ICC-01/04-01/06-2315-Conf, paragraph 3.

¹⁸⁶ Order in relation to the disclosure of the identity of P-143, 1 February 2010, ICC-01/04-01/07-1817, paragraph 16.

¹⁸⁷ ICC-01/04-01/06-2315-Conf, paragraph 4.

¹⁸⁸ ICC-01/04-01/06-2315-Conf, paragraph 5.

¹⁸⁹ ICC-01/04-01/06-2315-Conf, paragraph 6

stage of the proceedings it was unable to say whether it would advance a positive case and now, following the close of the prosecution evidence, it is able to do so.¹⁹⁰

73. The defence argues that it has questioned prosecution witnesses about the role of intermediaries. It is said that this has clearly been identified as a critical element of the accused's defence.¹⁹¹

74. The defence underlines the prosecution's reliance on the vital role played by the intermediaries, given they are REDACTED, and have critical relevant knowledge and contacts with potential witnesses.¹⁹² It is said that their potential influence was well demonstrated by prosecution witness 15 (REDACTED).¹⁹³

75. It is suggested that witness prosecution witness 297 (REDACTED), who is scheduled to testify on 17 May 2010,¹⁹⁴ when questioned by the defence outside of court, indicated that intermediary 321 (REDACTED) encouraged him to claim falsely that he had been enlisted in the UPC troops and he allegedly said that "he told me to go and see REDACTED. He is going to introduce me to the white people and he told me that if I tell those white people that I enrolled voluntarily they were going to ask me to leave". He added: "he said that if we testify against Thomas Lubanga, and if he is condemned we will have money".¹⁹⁵

76. The defence, for similar reasons, relies on the evidence of prosecution witness 298 (REDACTED), as set out above.¹⁹⁶

¹⁹⁰ ICC-01/04-01/06-2315-Conf, paragraph 9.

¹⁹¹ ICC-01/04-01/06-2315-Conf, paragraphs 11 – 15.

¹⁹² ICC-01/04-01/06-2315-Conf, paragraph 17.

¹⁹³ ICC-01/04-01/06-2315-Conf, paragraph 19.

¹⁹⁴ See oral ruling on defence application ICC-01/04-01/06-2307-Conf, transcript of hearing on 24 March 2010, ICC-01/04-01/06-T-271-CONF, page 9, lines 4-24.

¹⁹⁵ ICC-01/04-01/06-2315-Conf, paragraph 20.

¹⁹⁶ ICC-01/04-01/06-2315-Conf, paragraphs 21 and 22.

77. The defence prays in aid the records disclosed by the prosecution for witness expenses. The defence estimates that \$ 23,000 was spent on expenses for prosecution witness and intermediary 31 (REDACTED).¹⁹⁷ It is said that this witness had a close relationship with prosecution witness 07 (REDACTED), prosecution witness 08 (REDACTED), prosecution witness 11 (REDACTED), prosecution witness 157 (REDACTED), prosecution witness 294 (REDACTED) and prosecution witness 298 (REDACTED), relied on by the prosecution as former child soldiers, and in this context they highlight the role of intermediary 321 (REDACTED).¹⁹⁸ It is said generally that witnesses who claim to be former child soldiers have benefited from various protection programs, which have given them and their families help in various ways, including schooling, health and finance.¹⁹⁹ It is argued that factors of this kind have provided an incentive for witnesses to lie.²⁰⁰

78. It is observed that the defence only became aware of the identities of intermediaries 321 (REDACTED) and 316 (REDACTED) by happenstance, and that this knowledge, along with some additional information, is critical to enable the defence to conduct necessary further investigations.²⁰¹

79. The additional information sought by the defence, in addition to the identity of the intermediaries, includes details of each of the employees of the prosecution who had dealings with any individuals identified as potential witnesses to be called by the prosecution.²⁰² The defence seeks material on the professional background of all these people, and any relevant history concerning their involvement with REDACTED or other organizations within the DRC, particularly in the context of working to help children associated with

¹⁹⁷ ICC-01/04-01/06-2315-Conf, paragraph 23 and ICC-10/04-01/06-2315-Conf-Exp-AnxI, page 2.

¹⁹⁸ ICC-01/04-01/06-2315-Conf, paragraph 23.

¹⁹⁹ ICC-01/04-01/06-2315-Conf, paragraph 23.

²⁰⁰ ICC-01/04-01/06-2315-Conf, paragraph 23.

²⁰¹ ICC-01/04-01/06-2315-Conf, paragraphs 25 – 27.

²⁰² ICC-01/04-01/06-2315-Conf, paragraph 27.

armed conflict.²⁰³ Similarly, the defence seeks information on any payments made to them and whether remuneration was calculated on the basis of the results secured or whether another test applies.²⁰⁴

80. It is suggested that disclosure of this information to the defence is unlikely to endanger the safety of those involved, or impair the work of the OTP. It is argued that their identities, and that of their families, are already well-known by a significant number of people with whom they have had dealings.²⁰⁵ The defence argues that the intermediaries are less at risk of attack than the witnesses they assist, and the Chamber is reminded that each of the prosecution's witnesses have had their identities revealed to the defence.²⁰⁶ It is submitted that in these circumstances the security concerns that the prosecution expresses are without foundation.²⁰⁷

81. Moreover, it is argued that given the prosecution's case has closed, identifying the intermediaries at this stage will not endanger them.²⁰⁸ Furthermore, it is suggested that the defence will respect its confidentiality obligations.²⁰⁹

82. The defence contends that there is an issue as regards the intermediaries' commitment to the integrity of the judicial process and there needs to be a thorough investigation of their identities, any links with external authorities and their approach towards the witnesses.²¹⁰

²⁰³ ICC-01/04-01/06-2315-Conf, paragraph 27.

²⁰⁴ ICC-01/04-01/06-2315-Conf, paragraph 27 and footnote 23.

²⁰⁵ ICC-01/04-01/06-2315-Conf, paragraph 29.

²⁰⁶ ICC-01/04-01/06-2315-Conf, paragraph 30.

²⁰⁷ ICC-01/04-01/06-2315-Conf, paragraph 30.

²⁰⁸ ICC-01/04-01/06-2315-Conf, paragraph 31.

²⁰⁹ ICC-01/04-01/06-2315-Conf, paragraph 31.

²¹⁰ ICC-01/04-01/06-2315-Conf, paragraph 32.

83. The defence submits that any information that clarifies the roles of the intermediaries and other relevant employees of the prosecution will assist the accused, and including by way of giving evidence.²¹¹
84. Finally, the defence complains of certain particular instances of late disclosure.²¹² Documents and information relevant to prosecution witness 10 ((REDACTED), prosecution witness 293 (REDACTED), prosecution witness 294 (REDACTED), defence witness 05 (REDACTED), defence witness 06 (REDACTED) and witness DRC-D01-WWWW-0026, REDACTED (“defence witness 26 (REDACTED)”) were all allegedly served unjustifiably late.²¹³ It is suggested that because this has occurred immediately before the witnesses have been expected to give evidence, the defence has been unable to discuss the contents with them.²¹⁴ The defence repeats its request for immediate disclosure of all relevant materials.²¹⁵
85. In all the circumstances, the defence requests i) disclosure of the identities of all the prosecutor’s intermediaries or collaborators who have been in contact with any witnesses who are or were on the prosecution list of witnesses or who have been referred to as Court witnesses; ii) an order for the prosecution to call intermediaries 321 (REDACTED) and 316 (REDACTED) as witnesses; iii) an order for the prosecution to call one of the individuals within the prosecution in charge of its investigations; iv) a full inventory of the contacts between the intermediaries and other relevant employees of the prosecution with each potential prosecution witness (whether called or not) and those possibly appearing as witnesses of the Court; v) the professional background of the intermediaries and other relevant employees of the prosecution that have been

²¹¹ ICC-01/04-01/06-2315-Conf, paragraphs 33 and 34.

²¹² ICC-01/04-01/06-2315-Conf, paragraphs 37 – 39. See also Réponse de la Défense à la « Prosecution’s Submission Regarding Witness 157 », déposée le 15 avril 2010, 5 May 2010, ICC-01/04-01/06-2416-Conf.

²¹³ ICC-01/04-01/06-2315-Conf, paragraph 39.

²¹⁴ ICC-01/04-01/06-2315-Conf, paragraphs 41 and 42.

²¹⁵ ICC-01/04-01/06-2315-Conf, paragraph 42.

referred to in the proceedings,²¹⁶ and particularly as regards links with REDACTED and any work they have undertaken linked to helping children associated with armed groups; and vi) any remuneration or other benefits they have received, along with the method of calculation.²¹⁷

The Prosecution Proposed Procedure for Dealing with Intermediaries

86. On 17 March 2010 the prosecution suggested that the allegations advanced by the defence concern only two of the intermediaries and sought leave to submit by 22 March 2010 a proposal that would take into consideration the rights of the accused, the concerns of the Chamber, while protecting the intermediaries against whom there are no allegations as well as the ability of the prosecution to conduct its investigations.²¹⁸ The prosecution noted that even if the Chamber orders disclosure of the intermediaries' identities, security measures will first have to be put in place.²¹⁹ The Chamber took into account the prosecution's concerns, but fixed the deadline for submissions of 19 March 2010.²²⁰

87. In its written submissions of 19 March 2010, the prosecution submits in unequivocal terms that "[...] disclosure of the intermediaries' identities to the defence will have grave consequences to the fulfilment of its statutory functions and to the security of the intermediaries, their families as well as some other persons who were in contact with the Office of the Prosecutor (OTP)".²²¹

²¹⁶ These are listed in footnote 21 of ICC-01/04-01/06-2315-Conf: (1) intermediaries DRC-OTP-WWWW-0321 and DRC-OTP-WWWW-0316 and (2) the collaborators of the prosecution with the names REDACTED.

²¹⁷ ICC-01/04-01/06-2315-Conf, pages 16 – 17. See Prosecution's Request for Non-Disclosure of Information in Witness Related Expenses, 26 January 2010, ICC-01/04-01/06-2266-Conf-Exp, and redacted version filed on 10 February 2010 (notified on 11 February 2010), ICC-01/04-01/06-2266-Red; Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of Information in Witness Related Expenses", 19 February 2010, ICC-01/04-01/06-2308; Prosecution's Request for Non-Disclosure of Information in Documents related to Defence Witnesses and Re-Interviews with Prosecution Witnesses, 26 February 2010 (notified on 3 March 2010), ICC-01/04-01/06-2314-Conf-Exp, and redacted version filed on 2 March 2010 (notified on 3 March 2010), ICC-01/04-01/06-2314-Red; Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of Information in Documents related to Defence Witnesses and Re-Interviews with Prosecution Witnesses", datée du 2 mars 2010, 17 March 2010 (notified on 18 March 2010), ICC-01/04-01/06-2308.

²¹⁸ ICC-01/04-01/06-T-264-CONF-ENG ET, page 6, line 12 to page 7, line 9.

²¹⁹ ICC-01/04-01/06-T-264-CONF-ENG ET, page 7, lines 10 – 16.

²²⁰ ICC-01/04-01/06-T-264-CONF-ENG ET, page 7, line 17 to page 8, line 11.

²²¹ ICC-01/04-01/06-2362, page 3, 2nd paragraph of introduction (unnumbered)

88. The prosecution underlines what it suggests is the critical assistance provided by the intermediaries; it highlights that in this trial the prosecution has used six intermediaries to “reach half of its trial witnesses”.²²² It is argued that they undertake tasks in the field that staff members cannot fulfil without creating suspicion; they know members of the community, and they have access to information and places that are otherwise unavailable to the prosecution.²²³ The prosecution also referred to the fact that the Chamber has heard evidence that one intermediary who was assisting the Court was threatened.²²⁴

89. The prosecution submits that the assistance of these individuals includes their ability to assist the prosecution in investigating the defence assertions and evidence, as well as assisting the VPRS and the OPCV.²²⁵ The consequence of disclosure of their identities will be their relocation, together with their families, given the enhanced risks to their lives and wellbeing.²²⁶ It is argued that disclosure of the identities of these intermediaries could operate to deter others in the future.²²⁷ It is submitted that disclosure of this information should be a measure of last resort and “must be confined to those limited and exceptional circumstances where no alternative measures would be adequate to guarantee the fairness of the proceedings.”²²⁸

90. It is suggested that “[t]here are neither allegations nor evidence against the intermediaries whose identity is not already known to the defence.” It is the prosecution’s stance that notwithstanding the questioning “[...] to test the veracity of the accounts of prosecution witnesses and to test whether they had been coached or induced to lie before the Court, [...] no evidence of

²²² ICC-01/04-01/06-2362, page 3, 4th paragraph of introduction (unnumbered).

²²³ ICC-01/04-01/06-2362, paragraph 3.

²²⁴ ICC-01/04-01/06-2362, page 4, 4th paragraph of introduction (unnumbered).

²²⁵ ICC-01/04-01/06-2362, paragraph 4.

²²⁶ ICC-01/04-01/06-2362, paragraph 5.

²²⁷ ICC-01/04-01/06-2362, paragraph 6.

²²⁸ ICC-01/04-01/06-2362, paragraph 7.

impropriety has emerged".²²⁹ In those circumstances it is suggested that an alternative approach to disclosure of the intermediaries' identities would guarantee a fair trial.²³⁰

91. Given the observations of the Chamber on this issue (set out above), the prosecution now suggests a three-stage approach.²³¹ First, that an "appropriate" representative of the prosecution gives evidence about the use of intermediaries. Second, if, following that evidence, the Chamber determines that it remains necessary for one or more of the intermediaries to be called, this should be during an *in camera* hearing at which neither party is present. Third, only as a final measure should the Chamber consider revealing the role of intermediaries.²³²

92. As to the detail of the procedure the prosecution urges on the Chamber as the second stage, the prosecution suggests for that for those intermediaries whom the Chamber has deemed "sufficiently tainted" by specific allegations, they should be brought to The Hague to appear before the Chamber as court witnesses, to be questioned by the Chamber alone (in the absence of both parties) without revealing their identities to the defence. However, each side would be entitled to present a list of questions to the Chamber to be asked by the judges, with each party having the right to object to the proposed questions of the other. Thereafter, redacted transcripts are to be provided to the parties that may lead to requests for additional questions.²³³

93. It is said that the statutory and jurisprudential underpinnings of these proposals are Article 54(3)(f) of the Statute– the right of the Prosecutor to request measures to protect "any person" – along with the combined effect of

²²⁹ ICC-01/04-01/06-2362, page 3, 4th paragraph of introduction (unnumbered).

²³⁰ ICC-01/04-01/06-2362, paragraphs 8 – 10.

²³¹ ICC-01/04-01/06-2362, paragraphs 9 – 11 and 16.

²³² ICC-01/04-01/06-2362, page 4, 7th paragraph of introduction (unnumbered).

²³³ ICC-01/04-01/06-2362, paragraph 11.

the Article 68(1) and the jurisprudence of the Appeals Chamber;²³⁴ and it is argued that the Court has a duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of “persons at risk on account of the activities of the Court”. The prosecution also relies on Articles 64(6)(c) and (f) and 64(7) of the Statute, which enable the Court to protect confidential information and to derogate from the principle of holding a public trial in exceptional circumstances. Rule 88 enables the Chamber to order special measures, in order to facilitate the testimony of sensitive witnesses.²³⁵

94. The prosecution resists any suggestion that it is seeking to rely on anonymous witnesses to establish the guilt of the accused; the matter is put thus “[t]hese are not witnesses for the prosecution, and their evidence will not deal with the guilt or innocence of the accused, but rather with a wholly independent issue raised by the defence and related to allegations against some of the intermediaries”.²³⁶ The prosecution argues that the role of the Chamber will serve to protect the interests of the parties and ensure that the fairness of the proceedings is not undermined.²³⁷

95. Finally, it is argued that any prejudice to the defence that may flow from the lack of disclosure of the identities of the intermediaries is outweighed by the prejudice that would result to the intermediaries and their families, along with the prosecution’s ongoing investigations.²³⁸ The prosecution submits that some national criminal justice systems permit the examination of witnesses before a judge or examining magistrate whose identities are known to the court but not to the defence.²³⁹

²³⁴ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, paragraphs 43 – 44 and paragraphs 53 – 55.

²³⁵ ICC-01/04-01/06-2362, paragraphs 12 – 13.

²³⁶ ICC-01/04-01/06-2362, paragraph 14.

²³⁷ ICC-01/04-01/06-2362, paragraphs 7 – 8.

²³⁸ ICC-01/04-01/06-2362, paragraphs 3 – 8.

²³⁹ ICC-01/04-01/06-2362, paragraph 15.

Additional observations from the defence

96. The defence repeated its intention to demonstrate during the trial i) that intermediaries and other individuals working with the prosecution deliberately contributed to the presentation of false testimony before the court; and ii) that the prosecution delegated the task of identifying potential witnesses either to REDACTED, or to individuals employed as intermediaries by private organizations involved in providing assistance (and legal representation) to victims participating in the proceedings before the Court.²⁴⁰
97. It is argued that the analysis of the information on intermediaries REDACTED demonstrates that disclosure of additional information on all those working with the prosecution who had contacts with prosecution witnesses or participating victims is necessary to permit the Chamber to ensure the integrity of the judicial proceedings and the independence of the Court.²⁴¹
98. Contrary to the prosecution's stance, it is suggested that there are serious allegations against intermediary REDACTED.²⁴² The defence relies on the evidence of REDACTED and REDACTED to demonstrate his role in fabricating false testimony.²⁴³
99. It is suggested that that the REDACTED were involved in the investigations of the prosecution,²⁴⁴ REDACTED.²⁴⁵
100. It is averred that when interviewed by the prosecution, intermediary REDACTED indicated he had responsibilities REDACTED before and during

²⁴⁰ ICC-01/04-01/06-2364-Conf, paragraph 5.

²⁴¹ ICC-01/04-01/06-2364-Conf, paragraph 7.

²⁴² ICC-01/04-01/06-2364-Conf, paragraph 8; see also the statement taken on 6 October 2009, Annex II to the filing, ICC-01/04-01/06-2364-Conf-Anx2, pages 28 and 29 at lines 233-258.

²⁴³ ICC-01/04-01/06-2364-Conf, paragraph 9.

²⁴⁴ ICC-01/04-01/06-2364-Conf, paragraph 10.

²⁴⁵ ICC-01/04-01/06-2364-Conf, paragraphs 11 – 13.

his work as an intermediary for the prosecution.²⁴⁶ Between August 2006 and March 2007 he worked as REDACTED.²⁴⁷

101. As to the contention that he ceased working for the Court after 31 March 2006, when he took up his work REDACTED, it is suggested that there are receipts indicating he worked as an intermediary until 2009.²⁴⁸

102. By reference to a human rights report (REDACTED), the defence submits that REDACTED has been notoriously implicated in multiple grave human rights violations in the DRC.²⁴⁹

103. It is said that when interviewed by the prosecution, intermediary REDACTED admitted to having attempted to obtain reimbursement from the prosecution for a personal debt not connected with his services as an intermediary. He attempted to mislead the prosecution with the assistance of another person.²⁵⁰

104. It is alleged that the expense documents (receipts) disclosed to the defence reveal that intermediary REDACTED, at a minimum, received \$47000 between 2005 and 2009.²⁵¹

105. The expense documents are said to show that, at least in part, the remuneration was based on services actually rendered, i.e. establishing contact between the prosecution investigators and potential witnesses.²⁵²

²⁴⁶ ICC-01/04-01/06-2364-Conf, paragraph 11 with references to the statements contained in Annexes II and III to the filing.

²⁴⁷ ICC-01/04-01/06-2364-Conf, paragraph 11 with reference to the statement contained in Annex III to the filing.

²⁴⁸ ICC-01/04-01/06-2364, paragraph 12.

²⁴⁹ ICC-01/04-01/06-2364, paragraph 13.

²⁵⁰ ICC-01/04-01/06-2364, paragraph 14, with reference to the statement contained in Annex III to the filing.

²⁵¹ ICC-01/04-01/06-2364, paragraph 15.

²⁵² ICC-01/04-01/06-2364, paragraph 16.

106. The defence suggests that the expense documents also demonstrate that with this intermediary remuneration took many forms, often far removed from the usual remuneration of an employee of the court.²⁵³

107. As to intermediary REDACTED, it is argued that it has been established that he played a central role in providing a significant number of witnesses to the prosecution, for which he was paid.²⁵⁴ The defence suggest that it is likely that he also played an important role in assisting victims to participate in the proceedings.²⁵⁵

108. The defence underlines the evidence of certain defence witnesses about this individual, as well as the fact that when interviewed by the prosecution intermediary REDACTED indicated that while acting as a prosecution intermediary he also acted on instructions given to him by REDACTED intermediary REDACTED and the organization which the latter directed.²⁵⁶

109. It is submitted that intermediary REDACTED has revealed that while acting as an intermediary for the prosecution he also acted on instructions from REDACTED, who is a legal representative of several victims, including victim REDACTED.²⁵⁷

110. The defence submits that the prosecution thus employed as an agent an individual now acting for participating victims who, it is suggested, have a direct interest in the conviction of the accused.²⁵⁸

²⁵³ ICC-01/04-01/06-2364, paragraph 17, with reference to the statement contained in Annex IV to the filing.

²⁵⁴ ICC-01/04-01/06-2364, paragraph 18.

²⁵⁵ ICC-01/04-01/06-2364, paragraph 19.

²⁵⁶ ICC-01/04-01/06-2364, paragraphs 20 and 21, which references a statement given by 321 (REDACTED) in October 2009.

²⁵⁷ ICC-01/04-01/06-2364, paragraph 22.

²⁵⁸ ICC-01/04-01/06-2364, paragraph 23.

111. By way of summary, it is suggested that the cumulative effect of this information confirms that the prosecution has employed two intermediaries REDACTED, whose role is questioned, or those assisting victims participating in the proceedings. In either situation, it is argued these intermediaries were dependent on individuals who have an interest in the conviction of the accused.²⁵⁹ It is argued that this gravely affects the fairness of the proceedings and the independence of the Court.²⁶⁰

112. Critically, the defence suggests that if this has been established as being the position for two intermediaries REDACTED, the same is likely to apply to other intermediaries or those who collaborate with the prosecution.²⁶¹ In those circumstances, it is suggested it is particularly important to disclose all relevant information about the prosecution's intermediaries and collaborators.²⁶²

The defence response to the prosecution proposed procedure for dealing with intermediaries

113. On 24 March 2010, the defence's response to the "Prosecution Proposed Procedure for dealing with intermediaries" was filed.²⁶³

114. The defence repeated its request for someone in charge of the investigations for the prosecution to appear as a witness, in order to assist with how the investigations have been led and to explain the role of intermediaries.²⁶⁴

115. Additionally, the defence repeats its request for disclosure of the intermediaries' identities and their appearance in court as witnesses.²⁶⁵ The

²⁵⁹ ICC-01/04-01/06-2364, paragraph 24.

²⁶⁰ ICC-01/04-01/06-2364, paragraph 25.

²⁶¹ ICC-01/04-01/06-2364, paragraph 26.

²⁶² ICC-01/04-01/06-2364, paragraph 27.

²⁶³ ICC-01/04-01/06-2375.

²⁶⁴ ICC-01/04-01/06-2375, paragraph 3.

²⁶⁵ ICC-01/04-01/06-2375, paragraphs 4 – 6.

defence opposes the prosecution's suggestion that the intermediaries should appear before the judges alone.²⁶⁶

116. The defence emphasises that these are not victims or witnesses particularly exposed to the risk of reprisals, but instead intermediaries, and the international jurisprudence relied on by the prosecution is irrelevant to their position.²⁶⁷ It is emphasised that with intermediaries the defence does not at any stage effectively have an opportunity to test their involvement.²⁶⁸

117. Equally, it is suggested that the involvement of intermediaries is directly relevant on the Chamber's decision on the guilt or innocence of the accused.²⁶⁹

The Legal Representatives submissions

118. On 16 April 2010, the legal representatives filed the Legal Representatives response to the defence additional information on intermediaries.²⁷⁰

119. Objection is taken to the apparent suggestion on behalf of the accused that REDACTED may have engaged in inappropriate behaviour in this context.²⁷¹ It is argued that this is an unwarranted attack on the integrity of counsel.²⁷²

120. Addressing the specific charge that REDACTED may have given instructions to intermediary REDACTED, the observation is made that this individual has never worked in any capacity for the legal representatives, but instead was working for REDACTED. His role was to facilitate contact between lawyers REDACTED and individual victims, and thereafter with REDACTED. It is

²⁶⁶ ICC-01/04-01/06-2375, paragraph 7.

²⁶⁷ ICC-01/04-01/06-2375, paragraphs 9 and 10.

²⁶⁸ ICC-01/04-01/06-2375, paragraph 11.

²⁶⁹ ICC-01/04-01/06-2375, paragraph 12.

²⁷⁰ ICC-01/04-01/06-2394-Conf. The legal representatives requested an extension of the deadline (Demande de prorogation du délai pour répondre à la soumission de la Défense en date du 19 mars 2010, 31 March 2010, ICC-01/04-01/06-2385-Conf), which the Chamber granted orally on 31 March 2010 (Transcript of hearing on 31 March 2010, ICC-01/04-01/06-T-274-CONF-ENG ET, page 11, line 14 to page 12, line 15).

²⁷¹ ICC-01/04-01/06-2394-Conf, paragraph 1.

²⁷² ICC-01/04-01/06-2394-Conf, paragraph 8.

contended that he did not receive any instructions from REDACTED, since he received directions only from the REDACTED intermediary REDACTED, as well as REDACTED. REDACTED merely informed him as to when they were arriving. He did not assist with interviews conducted by counsel with victims and he was unaware of confidential information in this category.²⁷³

121. The legal representatives, given the financial constraints and practical difficulties under which they are working, sometimes enlist the assistance of volunteer intermediaries, such as REDACTED.²⁷⁴

122. Victim REDACTED is a dual-status victim. It is suggested that the relevant documentation relating to the intermediary reveals that neither the legal representatives nor any one else asked him to persuade victims to apply to participate or to collaborate with the prosecution; instead he organised meetings between victims and their counsel.²⁷⁵

123. The legal representatives suggest that it is important to focus on the particular roles played by each individual in this general category, and whether, for instance, they worked REDACTED and whether they merely established contact between the victims and legal representatives, without being in the employment of the latter.²⁷⁶

124. It is suggested that intermediaries are bound by principles of confidentiality.²⁷⁷

125. The legal representatives rely on the relevant chronology, namely that intermediary REDACTED was in contact with REDACTED prior to any contact with the prosecution. It is said that victim REDACTED was granted leave to

²⁷³ ICC-01/04-01/06-2394-Conf, paragraph 3.

²⁷⁴ ICC-01/04-01/06-2394-Conf, paragraph 5.

²⁷⁵ ICC-01/04-01/06-2394-Conf, paragraph 6.

²⁷⁶ ICC-01/04-01/06-2394-Conf, paragraphs 9 and 10.

²⁷⁷ ICC-01/04-01/06-2394-Conf, paragraph 11.

participate in the proceedings before his first contact with the prosecution. Initially, when victims agreed to contact with the prosecution, this had to be effected through the legal representatives, although latterly some direct contacts between prosecution and witnesses has become possible.²⁷⁸

The Prosecution's Submission of New Information on Threats against Intermediaries

126. REDACTED.²⁷⁹

127. REDACTED.²⁸⁰ REDACTED:

REDACTED²⁸¹

128. REDACTED.²⁸²

129. REDACTED.²⁸³

130. REDACTED.²⁸⁴ REDACTED.²⁸⁵

131. REDACTED.²⁸⁶ REDACTED,²⁸⁷ REDACTED.²⁸⁸ REDACTED.²⁸⁹

132. REDACTED.²⁹⁰

133. REDACTED.²⁹¹

²⁷⁸ ICC-01/04-01/06-2394-Conf, paragraph 13.

²⁷⁹ ICC-01/04-01/06-2397-Conf-Exp, paragraph 5.

²⁸⁰ ICC-01/04-01/06-2397-Conf-Exp, paragraph 6.

²⁸¹ ICC-01/04-01/06-2397-Conf-Exp, paragraph 7 (unofficial translation).

²⁸² ICC-01/04-01/06-2397-Conf-Exp, paragraph 8.

²⁸³ ICC-01/04-01/06-2397-Conf-Exp, paragraph 9.

²⁸⁴ ICC-01/04-01/06-2397-Conf-Exp, paragraph 11.

²⁸⁵ ICC-01/04-01/06-2397-Conf-Exp, paragraph 13.

²⁸⁶ Prosecution's Further Submissions of New Information relevant to threats against Intermediaries, 6 May 2010, ICC-01/04-01/06-2423-Conf-Exp.

²⁸⁷ ICC-01/04-01/06-2423-Conf-Exp, paragraph 2.

²⁸⁸ ICC-01/04-01/06-2423-Conf-Exp, paragraph 9.

²⁸⁹ ICC-01/04-01/06-2423-Conf-Exp, paragraphs 2 and 5.

²⁹⁰ ICC-01/04-01/06-2423-Conf-Exp, paragraph 10.

²⁹¹ ICC-01/04-01/06-2423-Conf-Exp, paragraph 12.

II. Relevant provisions

134. The Chamber has taken into consideration the following provisions:

Article 63 of the Statute

Trial in the presence of the accused

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64 of the Statute

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

- (c) Provide for the protection of confidential information;
- (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
- (e) Provide for the protection of the accused, witnesses and victims; and
- (f) Rule on any other relevant matters.

[...]

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

[...]

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the

accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 69 of the Statute Evidence

[...]

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

[...]

Rule 77 of the Rules Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 81 of the Rules Restrictions on disclosure

[...]

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to

protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

[...]

Rule 83 of the Rules

Ruling on exculpatory evidence under article 67, paragraph 2

The Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.

Rule 84 of the Rules

Disclosure and additional evidence for trial

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Rule 87 of the Rules

Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted *ex parte*;

(b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;

(c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;

(d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any

victim or his or her legal representative, if any, who would be affected by such protective measure; and

(e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

III. Analysis and conclusions

135. The precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial. Contrary to the prosecution's argument, the defence submissions are not dependent on speculative assertions: they are, to an important extent, clearly evidence based. Given the extensive rehearsal of the relevant testimony and documents set out above, it is unnecessary to repeat in detail the particular facts on which defence counsel rely; instead, the Chamber needs to focus on the consequences of the material now before the Court.

136. The Chamber is not persuaded that these applications can be satisfactorily resolved by the prosecution's "three-stage approach". Although it is argued the "appropriate representative" is the best person to provide comprehensive and detailed information about the precise role of the intermediaries, how they were selected and the tasks they performed, there is a complete absence of information about this individual, and no statement – even in draft form – is

provided of his or her evidence. Apart from suggesting the person would be able to explain how individuals were contacted and selected, and how the Office managed those who were interviewed during the investigation, no other details, of any kind, are provided. It follows that the Chamber is invited to rule on the potential probity and usefulness of evidence that has not been provided.²⁹²

137. Although Rule 83 of the Rules permits the prosecution to request a hearing on an *ex parte* basis for a determination of whether evidence in its possession is exculpatory under Article 67(2) of the Statute, excluding the defence from all of these stages, save for the last, would be unfair to the accused and would undermine the fundamental principle that the trial should be held in his presence (Article 63 of the Statute). The Chamber would be investigating substantive and complicated factual issues that cannot properly be resolved without the participation of the accused and his representatives. The prosecution suggests that the “appropriate representative” would be able to provide comprehensive and detailed information about the precise role of the intermediaries, how they were selected and the tasks they performed, and that the “tainted” intermediaries could be brought to the Court to be questioned by the judges alone (in the absence of both parties). This would involve the Chamber conducting part of the trial, on a highly contentious and potentially important matter, in the absence of the accused. Although the Chamber has the duty to protect the safety, physical and psychological well-being, dignity and privacy of persons at risk on account of the activities of the Court, this suggested step would be incompatible with the accused’s fair-trial rights. The

²⁹² ICC-01/04-01/06-2362, paragraph 10. See also ICC-01/01-0/06-T-110-ENG WT, page 6, lines 4-19; Transcript of hearing on 30 January 2009, ICC-01/01-0/06-T-113-ENG WT, page 1, line 9 – page 9, line 21 and page 23, line 15 – page 25, line 2; Transcript of hearing on 12 February 2009, ICC-01/01-0/06-T-125-ENG WT, page 44, line 22 – page 46, line 15; Transcript of hearing on 20 February 2009, ICC-01/01-0/06-T-132-ENG WT, page 35, line 17 – page 39, line 9; Transcript of hearing on 14 May 2009, ICC-01/01-0/06-T-174-CONF-ENG CT, page 18, line 6 – page 21, line 23; Transcript of hearing on 16 June 2009, ICC-01/01-0/06-T-192-Red-ENG WT2, page 13, line 4 – page 14, line 8; Transcript of hearing on 19 June 2009, ICC-01/01-0/06-T-195-ENG WT, page 59, line 14 – page 61, line 16.

Chamber notes that the Rome Statute framework does not provide for the anonymous testimony of witnesses at trial (see *e.g.* Articles 67(1)(e) and 68(1) of the Statute and Rules 76, 81(4), 82(1) and 87 of the Rules).

138. The Chamber is alive to the potential risks to the intermediaries employed by the prosecution once their identities are revealed to the accused, as well as the possible adverse implications as regards their future usefulness, but there is now a real basis for concern as to the system employed by the prosecution for identifying potential witnesses. On the evidence, there was extensive opportunity for the intermediaries, if they wished, to influence the witnesses as regards the statements they provided to the prosecution, and, as just set out, there is evidence that this may have occurred. In the circumstances it would be unfair to deny the defence the opportunity to research this possibility with all of the intermediaries used by the prosecution for the relevant witnesses in this trial, where the evidence justifies that course.

139. On the basis of the history and the submissions set out extensively above, and applying the Rome Statute framework and the analysis just rehearsed, the Chamber has adopted the following approach:

- a. Given the markedly different considerations that apply to each intermediary (or others who assisted in a similar or linked manner), disclosure of their identities to the defence is to be decided on an individual-by-individual basis, rather than by way of a more general, undifferentiated approach.
- b. The threshold for disclosure is whether *prima facie* grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal

contradictions or by other evidence. In these circumstances, the intermediary's identity is disclosable under Rule 77 of the Rules. Given the evidence before the Chamber that some intermediaries may have attempted to persuade individuals to give false evidence, and that some of the intermediaries were in contact with each other, the Chamber considers that in these circumstances the defence should be provided with the opportunity to explore whether the intermediary in question may have attempted to persuade one or more individuals to give false evidence. However, in each instance the Chamber has investigated, and will investigate, the potential consequences of an order for disclosure for the intermediary and others associated with him, and whether lesser measures are available. Applications in this regard will be dealt with by the Chamber on an individual basis.

- c. The identities of intermediaries (or others who assisted in a similar or linked manner) who do not meet the test in b. are not to be disclosed.
- d. Disclosure of the identity of an intermediary (or others who assisted in a similar or linked manner) is not to be effected until there has been an assessment by the VWU, and any protective measures that are necessary have been put in place.
- e. The identities of intermediaries who did not deal with trial witnesses who gave incriminating evidence are not to be revealed, unless there are specific reasons for suspecting that the individual in question attempted to persuade one or more individuals to give false evidence or otherwise misused his or her position. Applications in this regard will be dealt with by the Chamber on an individual basis.

- f. The threshold for calling intermediaries prior to the defence abuse submissions is that there is evidence, as opposed to *prima facie* grounds to suspect, that the individual in question attempted to persuade one or more individuals to give false evidence.

140. There is evidence, at this stage of the case, from a range of witnesses that intermediaries 321 (REDACTED) and 316 (REDACTED) may have misused their positions in varying ways, but the underlying allegation is that they have persuaded or invited witnesses to give false testimony to the Court. Moreover, there is evidence that this behaviour may have extended beyond those two intermediaries. For instance, prosecution witness 15 (REDACTED), testified that there were a number of intermediaries who were in touch with witnesses, and that the intermediaries knew each other and collaborated, and given the extensive allegations made against two of the key intermediaries, there is a real risk that similar evidence may exist in relation to other intermediaries or collaborators, if their roles are fully investigated and researched. The identities of intermediaries 316 (REDACTED) and 321 (REDACTED) have already been revealed.

141. The Chamber is of the view, in light of the extensive allegations made against intermediaries 316 (REDACTED) and 321 (REDACTED), that it is in the interests of a fair trial for these two individuals to be called to deal with the suggestions that they attempted to persuade one or more individuals to give false evidence. Their testimony before the Court is likely to assist the Chamber in resolving, first, the criticisms that have been levelled against them; second, some of the extensive conflicts in the evidence that have emerged during the trial; and, third, the possible contacts between intermediaries. Therefore, the prosecution is ordered to call intermediaries 316 (REDACTED) and 321 (REDACTED) following the defence witnesses relevant to abuse of process and before the submissions of the parties and the participants on this issue. Should

they refuse to give evidence, a full explanation is to be provided to the Chamber.

142. The Chamber notes that when interviewing intermediary 316 (REDACTED) in October 2009, the prosecution informed him that it had “grounds to believe” that he “may have committed a crime or crimes which fall within the jurisdiction of the International Criminal Court specifically under Article 70 of the Statute and that is known as ‘Offences against the administration of justice’.”²⁹³ The interview was attended by counsel for intermediary 316 (REDACTED). In these circumstances and given the evidence heard by the Chamber so far, the Registry is to apply the Chamber’s established procedures for dealing with potential self-incrimination pursuant to Article 55 of the Statute and Rule 74 of the Rules, for both intermediary 316 (REDACTED) and intermediary 321 (REDACTED)²⁹⁴

143. As regards intermediary 143 (REDACTED), the cumulative effect of the relevant evidence (*viz.* he liaised with REDACTED witnesses whose evidence (for REDACTED of them) is contradicted by family members or others called by the defence; who (for REDACTED of them) know each other; and who (in one instance) is himself an intermediary) is that the threshold for disclosure of his identity to the defence is clearly crossed, under Rule 77 of the Rules. In particular, the defence is entitled to research whether the allegedly untrue testimony that has been given was influenced by untoward behaviour on his part. For these reasons, his identity is now evidence which is “[...] material to the preparation of the defence”. The Chamber stresses that it has taken into account the consequences of this Decision for intermediary 143 (REDACTED), REDACTED, and it has considered whether any lesser solution, falling short of revealing his identity, would suffice. In the event, the Chamber is sure that in

²⁹³ ICC-01/04-01/06-2364-Conf-Anx2, pages 28 and 29.

²⁹⁴ Transcript of hearing on 28 January 2009, ICC-01/01-0/06-T-110-ENG WT, page 4, line 10 – page 5, line 17.

order to enable the defence to conduct necessary and meaningful investigations and to secure a fair trial for the accused, it is strictly necessary for his identity to be disclosed. Without his identity, this will not be possible. The Chamber reminds the defence that this information is disclosed confidentially, solely for the purposes of *bona fide* trial preparation. However, the evidence concerning this intermediary does not meet the criteria for ordering him to be called in the context of the abuse of process application.

144. Turning to REDACTED intermediary 31 (REDACTED) whose identity is known to the defence, REDACTED intermediary introducing individuals to the prosecution. Accordingly, there is no additional disclosure that the Chamber is aware of that can usefully be effected. The evidence concerning this intermediary does not meet the criteria for ordering him to be re-called in the context of the abuse of process application.

145. None of the other intermediaries meet the test for disclosure of their identities or the test to be called to give evidence during this abuse of process application. In particular, intermediaries 81 (REDACTED), 123 (REDACTED), 154 (REDACTED), 254 (REDACTED) and 290 (REDACTED), whose positions have been individually raised, do not meet the criteria for disclosure or to be called.

146. The defence has applied for an order for the prosecution to call one or more individuals who were in charge of its investigations, in order to give evidence about the use of intermediaries in this case. The Chamber notes that the first witness to testify in the *Katanga and Ngudjolo* case on 25 November 2009 was an investigator of the Office of the Prosecutor called at the request of Trial Chamber II *inter alia* to provide it with general information on the conduct of the investigations into the facts to be presented during the course of the trial.²⁹⁵

²⁹⁵ Transcript of hearing on 25 November 2009, ICC-01/04-01/07-T-81-ENG; Decision on the Application by the Defence for Mathieu Ngudjolo for Postponement of the Commencement Date for the Hearing on the Merits

Given the questions that have been raised as to the recruitment and supervision of the intermediaries, and the contacts between some of them, the Chamber is of the view that a witness (*viz.* the appropriate representative identified by the prosecution) called to testify as to the approach and the procedures applied to intermediaries is likely to assist the court in resolving the various issues that have arisen. In these circumstances, the prosecution is to call the appropriate representative following the defence witnesses on the abuse of process application, prior to the submissions of the parties and the participants.

147. On a linked issue, given the extensive criticisms that have been directed at two key intermediaries, the Chamber accedes to the defence request for a schedule setting out the known contacts between the intermediaries, between the intermediaries and the witnesses, and between the witnesses. This should indicate, *inter alia*, the dates of meetings, the names of those present and the location.

148. The Chamber will deal with the arguments as regards alleged late disclosure by the prosecution in a separate Decision.

149. The Chamber stresses that it has not reached any factual conclusions; the orders set out above are based on the evidence that has been called thus far, but the factual issues in this trial await final determination by the judges.

IV. Orders

150. The prosecution is ordered to:

(rule 132(1) of the Rules of Procedure and Evidence), 5 November 2009, ICC-01/04-01/07-1603-tENG, paragraphs 17 - 19.

- i) Disclose confidentially to the defence the names, and other necessary identifying information, of the intermediary 143 (REDACTED) once the necessary protective measures have been implemented.
- ii) Disclose confidentially (by way of a filing) to the defence a short account of the professional backgrounds of intermediaries 143 (REDACTED), 316 (REDACTED) and 321 (REDACTED), REDACTED.
- iii) Call intermediaries 316 (REDACTED) and 321 (REDACTED) following the defence witnesses relevant to the abuse of process application, prior to submissions on the issue.
- iv) Call the appropriate representative (*viz.* the lead investigator) following the defence witnesses relevant to the abuse of process application, prior to submissions on the issue.
- v) Provide a schedule confidentially (by way of a filing) to the defence setting out the known contacts between the 23 intermediaries,²⁹⁶ between the intermediaries and the witnesses, and between the witnesses. This should indicate, *inter alia*, the dates of meetings, the names of those present and the location.

V. Postscript

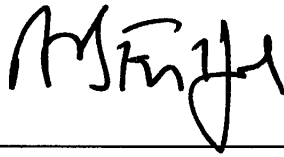
151. As set out in paragraph 54 of the Chamber's Decision on the press interview with Ms Le Fraper du Hellen,²⁹⁷ it has been necessary to consider the impact of that interview on the issue of the disclosure of the identities of the intermediaries in this Decision. In the event, given the analysis and approach

²⁹⁶ See paragraph 3 above.

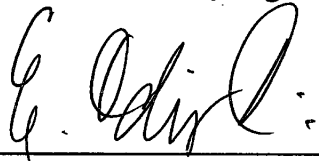
²⁹⁷ ICC-01/04-01/06-2433.

set out above, the comments of the prosecution representative do not materially affect the orders set out above, not least because the Chamber has ordered the prosecution to call an appropriate representative to explain the approach and the procedures applied to intermediaries.

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 31 May 2010

At The Hague, The Netherlands

Public

ANNEX A

Decision on Intermediaries

The Chamber set out its original position on non-disclosure of information relating to intermediaries on numerous occasions, including in the following decisions:¹

1. Oral decision of 18 January 2008, Transcript ICC-01/04-01/06-T-71-ENG ET WT, page 1, line 15 – page 11, line 10 and ICC-01/04-01/06-T-72-CONF-EXP-ENG ET, page 2, lines 8 – 17;
2. Order granting prosecution's application for non-disclosure of information provided by a witness, 31 January 2008, ICC-01/04-01/06-1146-Conf-Exp, paragraphs 8 – 9. A redacted version was issued on 11 March 2008, ICC-01/04-01/06-1221-Conf;
3. Decision on the prosecution's application for non-disclosure of information filed on 7 May 2008, 17 December 2008, ICC-01/04-01/06-1560-Conf-Exp, paragraphs 23 and 24. A redacted version was issued on 5 May 2009, ICC-01/04-01/06-1834;
4. Decision on "Prosecution's Application for Non-disclosure of Information" filed on 14 May 2008, 17 December 2008, ICC-01/04-01/06-1561-Conf-Exp, paragraph 13. A redacted version was issued on 5 May 2009, ICC-01/04-01/06-1835;
5. Oral decision of 16 February 2009, Transcript ICC-01/04-01/06-T-127-CONF-EXP-ENG CT, page 1, line 11 – page 5, line 8;

¹ The list is not exhaustive.

6. Oral decision of 13 March 2009, Transcript ICC-01/04-01/06-T-146-CONF-EXP-ENG CT, page 1, line 10 – page 7, line 15;
7. Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf, paragraphs 32 – 34. Corrected and redacted versions were issued on 2 June 2009, ICC-01/04-01/06-1924;
8. Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" of 5 December 2008 and "Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information" of 12 March 2009, 12 June 2009, ICC-01/04-01/06-1965-Conf-Exp, paragraphs 11, 12, 49, 53 and 54. Redacted versions were issued on the 24 June 2009, ICC-01/01-01/06-1980;
9. Decision on the "Prosecution's Application for Non-Disclosure of Sources contained in the meta-data in compliance with the Consolidated E-Court Protocol" of 16 April 2009, 28 October 2009, ICC-01/04-01/06-2179-Conf-Exp, paragraphs 18, 31 – 32. Redacted versions were issued on 11 November 2009, ICC-01/04-01/06-2179-Conf-Red, ICC-01/04-01/06-2179-Red2;
10. Decision on the prosecution's application for non-disclosure of information filed on 17 July 2009, 13 November 2009, ICC-01/04-01/06-

2186-Conf-Exp, paragraphs 13 – 18 and 22. A redacted version was issued on 10 December 2009, ICC-01/04-01/06-2186-Red;

11. Decision on the application to disclose the identity of intermediary 143, 18 November 2009, ICC-01/04-01/06-2190-Conf-Exp. Redacted versions were issued on 10 December 2009, ICC-01/04-01/06-2190-Conf-Red, ICC01/04/01/06-2190-Red;

12. Decision on the Prosecution's Request for Non-Disclosure of Information of 19 December 2008, and the Prosecution's Request for Non-Disclosure of Information of 4 February 2009, 10 December 2009, ICC-01/04-01/06-2208-Conf-Exp. Redacted and corrected versions were issued on 12 March 2010, ICC-01/04-01/06-2208-Red-Corr and 31 March 2010, ICC-01/04-01/06-2208-Conf-Red.